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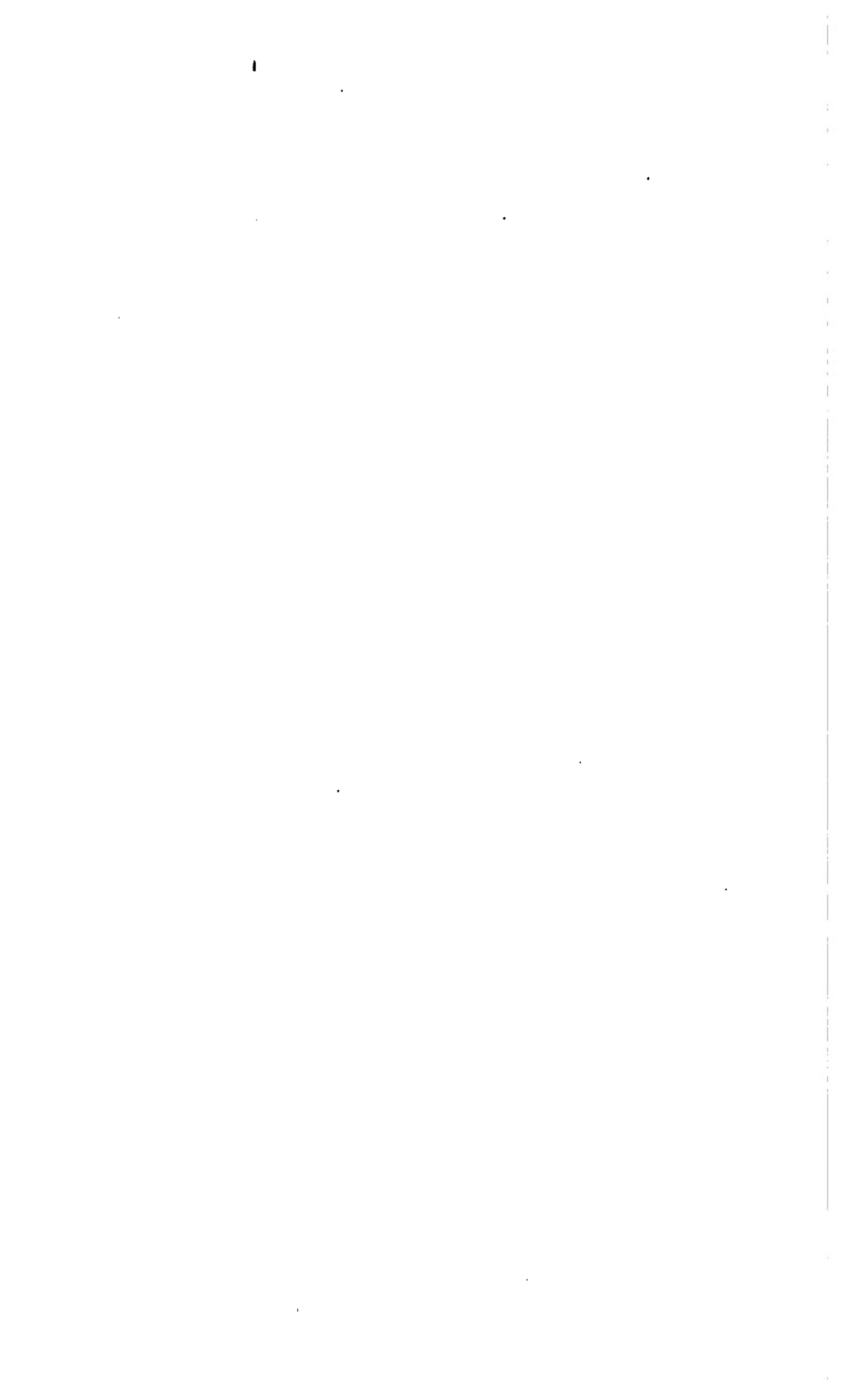


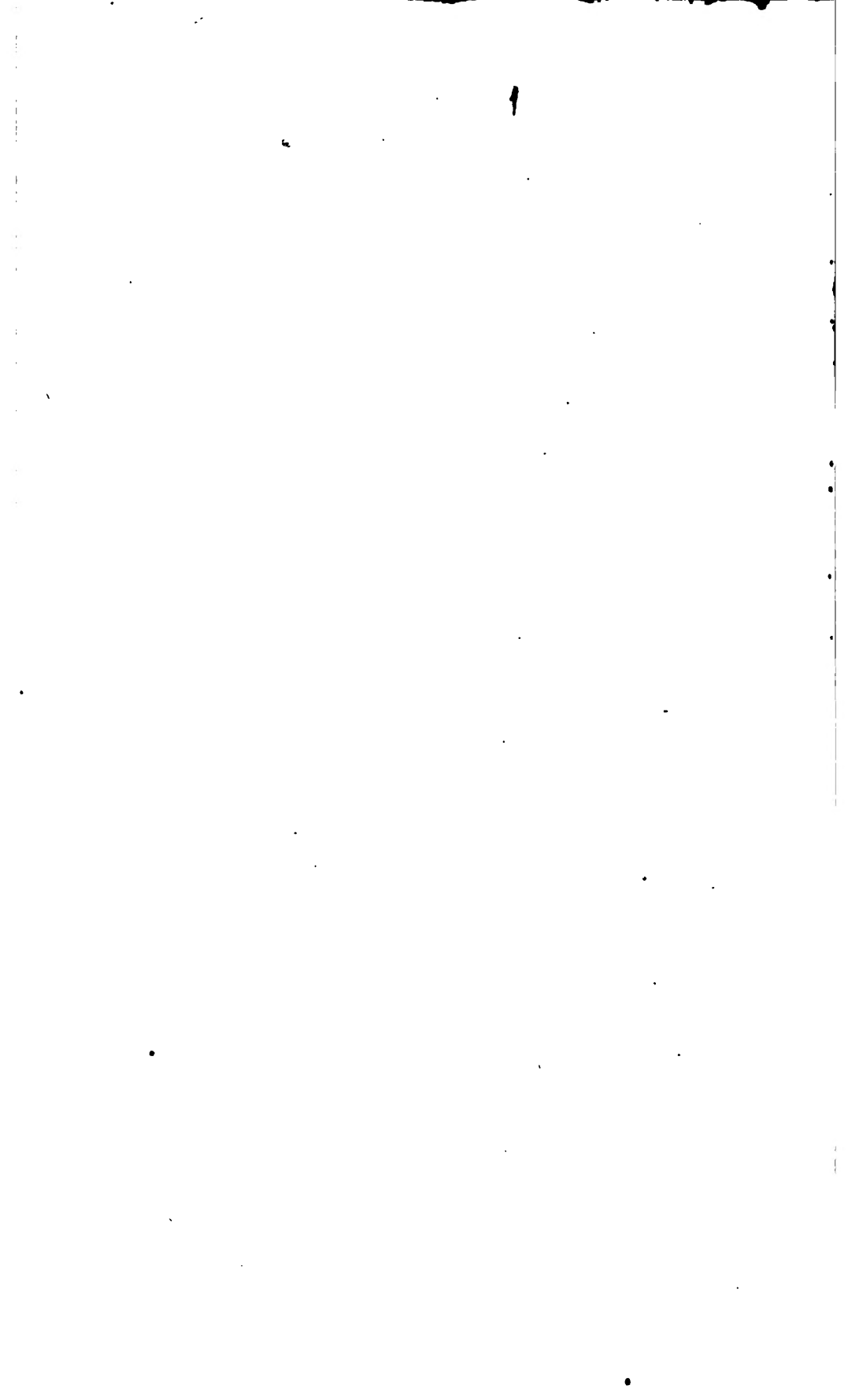
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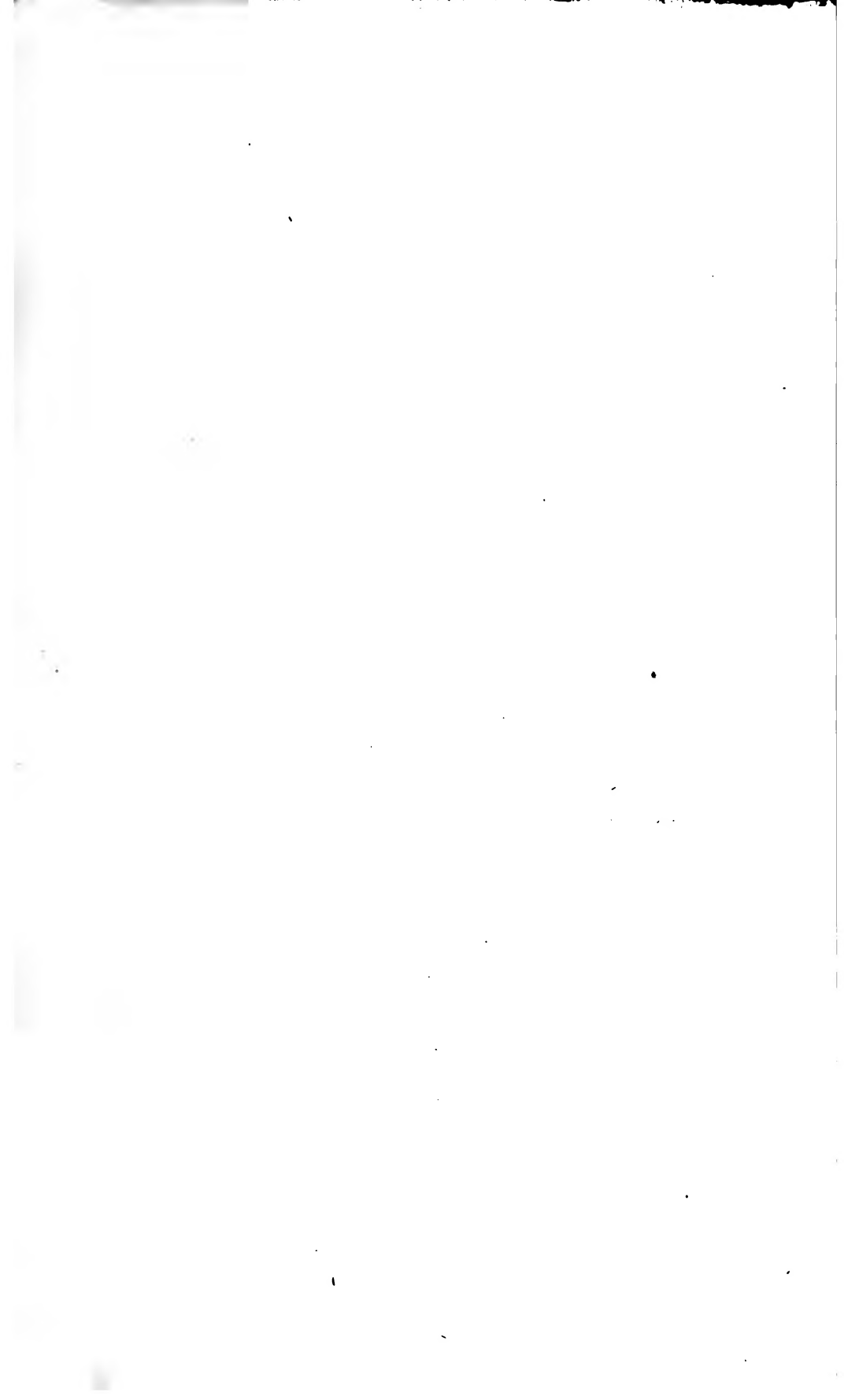
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REPORTS
OF
CASES
ARGUED AND DETERMINED
BEFORE THE
MOST NOBLE AND RIGHT HONORABLE
THE LORDS COMMISSIONERS OF APPEALS
IN
PRIZE CAUSES:

ALSO ON APPEAL TO
THE KING'S MOST EXCELLENT MAJESTY IN COUNCIL.

WITH AN APPENDIX,
CONTAINING ORDERS IN COUNCIL, NOTIFICATIONS, INSTRUCTIONS, ETC.,
RELATING TO PRIZE AND MARITIME LAW, ISSUED FROM
JUNE 12, 1809, TO AUGUST 15, 1810.

By THOMAS HARMAN ACTON, Esq.,
OF THE MIDDLE TEMPLE.

EDITED BY GEORGE MINOT,
COUNSELLOR AT LAW.

VOLUME I.

CONTAINING THE JUDGMENTS IN JUNE, 1809, TO JULY, 1810.

VOL V of 25

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It has been long a subject of regret, that the decisions in the High Court of Appeals have never yet been published, notwithstanding many of them are of very considerable importance, and involve questions of national policy and general principles of jurisprudence. The design of this work, therefore, requires no other apology.

The author had at first proposed to publish only the most material of those cases which issued from the High Court of Admiralty or the Vice-Admiralty Courts, and are determined by the Lords Commissioners of Appeal in Prize Causes. It was afterwards suggested, that he might with propriety include in this work, cases upon appeal from various other courts throughout our colonies and dependencies, which are referred to the decision of his Majesty in Council.

In undertaking this task, he has been actuated by a sincere desire to be serviceable in his profession; and whilst he feels a degree of anxiety as to the opinion which may be generally entertained of its execution, he looks forward with hopes of advice and assistance from persons of eminence, to enable him to render the future numbers of this work more acceptable to the profession and the public.

MIDDLE TEMPLE.



TO
THE MOST NOBLE
RICHARD COLLEY, MARQUIS WELLESLEY, K. G.,
SECRETARY OF STATE FOR FOREIGN AFFAIRS,
ETC., ETC., ETC.,

THESE REPORTS
ARE, BY PERMISSION, DEDICATED, WITH THE HIGHEST RESPECT
FOR THOSE DISTINGUISHED TALENTS,
WHICH, FROM EARLY LIFE,
HAVE BEEN SO SUCCESSFULLY EXERTED IN THE SERVICE OF HIS COUNTRY,
AND,
DURING A PERIOD OF UNEXAMPLED DIFFICULTY,
CALLED HIM TO DISCHARGE THE ARDUOUS DUTIES
OF
FOREIGN MINISTER,
BY HIS LORDSHIP'S MOST OBLIGED AND
MOST OBEDIENT SERVANT,

T. HARMAN ACTON.

INNER TEMPLE,
November, 1810.

J U D G E S
OF
THE COURT OF THE LORDS COMMISSIONERS
OF APPEALS IN PRIZE AND COLONIAL CASES,
DURING THE PERIOD CONTAINED IN THIS VOLUME.

THE RIGHT HONORABLE EARL CAMDEN,
LORD PRESIDENT OF THE COUNCIL.

RIGHT HONORABLE SIR WILLIAM GRANT,
MASTER OF THE ROLLS.

RIGHT HONORABLE SIR WILLIAM SCOTT,
JUDGE OF THE HIGH COURT OF ADMIRALTY OF ENGLAND.

RIGHT HONORABLE SIR WILLIAM WYNNE.

RIGHT HONORABLE SIR JOHN NICHOL,
JUDGE OF THE ARCHES COURT.

With others of their Lordships whose Attendance is not Uniform.

SIR CHRISTOPHER ROBINSON.
KING'S ADVOCATE-GENERAL,

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REPORTS OF CASES
DETERMINED IN THE
HIGH COURT OF APPEALS.

BEFORE THE MOST NOBLE AND RIGHT HONOR-
ABLE THE LORDS COMMISSIONERS OF APPEALS
IN PRIZE CAUSES.

SWIFT, Davis, master.

June 10, 1809.

A neutral vessel recaptured from the enemy, may, if necessary for the mutual safety and interest of herself and the recaptors, be equipped, armed, and employed at her own risk, in protecting herself and the recaptors from the attack of the enemy's cruisers.

THIS was an appeal from the sentence of the Vice-Admiralty Court of Jamaica, which had sentenced the recaptors of the schooner *Swift* to restitution of so much of the cargo as had been saved from the wreck of the said schooner. The wreck took place in consequence of her being armed on her recapture, and employed in chasing such enemy's vessels as seemed disposed to attack the captor, his Majesty's ship *Fisgard*, then on shore in Samana Bay, and in considerable danger, from which she was released by the assistance of the schooner. The sentence of the Vice-Admiralty Court directed also the payment of the captors full costs out of purse by the appellants.

* *Swaby*. The case of the appellants is peculiarly dis- [*2]
tressing. This vessel has been the property of American mer-
chants, and by no means therefore concerned in the protection of our
vessels of war. She had been fitted out with a valuable cargo from

The Swift. 1 Acton.

Baltimore, besides \$10,000 in specie, which had been altogether lost in the wreck of the vessel. In this voyage she had been captured by a French privateer, and recaptured by the boats of The Fisgard in Sumana Bay, where she was employed by the captain of The Fisgard, which was then aground, in getting her afloat, and afterwards armed and compelled to protect her from the enemy's cruisers, in which occupation she struck on a coral reef. The conduct of the British commander was unprecedented and unjustifiable; since, on her recapture, she should have been permitted to proceed on her voyage without interruption, or at least, if it became necessary for the preservation of his Majesty's ship that she should be employed in this perilous enterprise, those, for whose safety she had exerted herself, should be liable to all risk and hazard attending the undertaking. Nor can it be denied, that any obligation she lay under to the recaptors had been completely requited by the important service she had rendered them in getting their vessel afloat, and thus delivering them from falling into the hands of the enemy. From these weighty considerations we are encouraged to hope your lordships will reverse the decree of the court, and condemn the recaptors to restitution of the full value of the whole cargo, with costs.

Stephen, for the respondent. Your lordships must perceive this appeal is the offspring of ingratitude, and that to grant the [* 3] *request of the appellant would be to commit an act of gross injustice. His Majesty's ship interests itself for the preservation of this schooner, and liberates her from the cruisers of the enemy, which, however, from their number, are very formidable: she is therefore armed for their mutual safety, and in attempting to destroy these vessels, that she and her protector might prosecute their respective voyages in security, she becomes a wreck. His Majesty's ship assists her in recovering almost all her cargo; and no one, not even the captain, when questioned whether she had any specie on board, dares to insinuate she had a single dollar. She obtains all that part of her cargo saved from the wreck, and after all these benefits conferred, the owners have the presumption to come before your lordships, and make a demand for all that part of her cargo lost in the wreck, including specie, which she appears never to have had on board, with costs. Certainly such an application will meet from the court that fate it so eminently deserves.

JUDGMENT.

SIR W. GRANT, [Master of the Rolls.] As to compensation for the specie, there appears no proof of her having any on board. The

Pipon v. Coutanche. 1 Acton.

accident which occurred was the mere consequence of a warfare she was obliged to carry on for her own preservation. She was not at all employed as a cruiser, but appears to have been armed only on the principle of self-defence; and probably nothing else could so effectually preserve her from the enemy: we therefore affirm the decree.

—◆—

ON APPEAL TO THE KING'S MOST EXCELLENT MAJESTY IN COUNCIL.

*PIPON, Appellant. COUTANCHE, Respondent. [*4]

June 7, 1809.

Lords of fiefs in the island of Jersey not bound to discharge rents or incumbrances due on estates falling into their possession by the decease of their tenants.

THIS was a case of appeal from the judgment of the Royal Court in Jersey, by which the lord of the fief in question was condemned to discharge rent, and incumbrances due on an estate, falling into his possession by the tenant's decease.

The *King's Advocate* for the appellant. The law of the island recognizes the right of the lord of the fief, on the decease of the tenant holding under him to enter into possession of the premises, and receive for one year the produce thereof, if claimed by the heir; but in default of heirs, the lord of the fief becomes seized of the estate forever. And while the law is thus express as to the right of the lord, it makes no provision for the payment of any incumbrances, or arrears of rent, by the lord, which may remain due on the estate at the time of the tenant's decease, or accrue during the lord's possession. This is the point at issue in the present case. The respondent has obtained a judgment in the Royal Court of the island, by which the appellant has been condemned to pay either two thirds of the said rents, or restore to the respondent, as heir at law, two thirds of one year's produce of the estate, at the option of the lord. From this sentence he has appealed to his Majesty in council, and rests the strength of his application * on the express law of [*5] the island, supported by the opinion of the frank tenants of the island, who have been examined by the Royal Commissioners on this point, and who then agreed in considering the lord of the fief not

Pipon v. Coutanche. 1 Acton.

bound in law to discharge the rent or incumbrances due on an estate so falling into his possession.

Dallas, for respondent. The law itself contains no express provision to exonerate the lord. Its silence has been more than counterbalanced by the uniform custom of the other lords of manors in the island since the year 1771, who have always discharged such incumbrances. The inhabitants of the island have felt themselves aggrieved by the exercise of this assumed right, and have warmly remonstrated to the government of the island against it. If there is any thing further necessary to invalidate the appellant's claim, the unreasonable and unjust nature of this appeal from the decision of that court, most calculated to ascertain the rights of his Majesty's subjects in that island, will not fail to have its due weight in bringing your lordships to a decision in support of the sentence of the Royal Court.

JUDGMENT.

SIR W. GRANT. If their lordships see the case in the light it presents itself to me, there can be no hesitation as to our decision. The law, as stated to us, has its foundation in the remotest antiquity, acknowledged by all, and even proved by the remonstrances made against it by several of the inhabitants to have been always [*6] taken in the *sense contended for by the appellant. Formerly the lords had greater privileges, and were enabled to exact even the personal services due to them by tenants of the fief. Of this, however, they were deprived in course of time; but the right now contended for still exists; and the report of the Royal Commissioners sanctions this right. The representation of the inhabitants only complains of the law itself. If the law be a bad one, it should be reversed. It remains for us only to decide according to the law as it now stands. To this the respondent's council has opposed practice since the year 1771. Where there is no law this may be a good criterion certainly; but it can never be supposed that the omission of some lords of fiefs to enforce their undoubted privileges can affect those of others. Such is merely an act of grace and favor on their parts, and is not in the least binding on others. It is therefore our decision, that the decree of the Royal Court be reversed.

• AT COUNCIL.

[*7]

LEMPRIERE, Appellant; LE BRUN, Respondent.

A covenant to pay a common rent as seigneurial, binding, notwithstanding the said rent may have been before alienated from the fief, and only been repurchased by the lord.

THIS was also a case of appeal from the Royal Court of Jersey, praying that its judgment might be reversed, whereby it had been determined that a seigneurial rent, having been purchased of the lord of the fief and afterwards repurchased by the said lord, changed its properties as a rent seigneurial, and became a common rent, or *rent rotuiere et fonciere*.

Wetherell, for the appellant. By the law and usage of the island, there can exist no doubt that a seigneurial rent, which from any cause whatsoever has been alienated, and is again reunited or repurchased and vested in the lord, resumes its ancient quality of a seigneurial rent. This last species of rent is more valuable, as it is paid in kind from the produce of the soil, which of late years has much increased in value. Common rents are, on the contrary, paid at an established rate per bushel; most of the rents of the island being paid in wheat and other articles, the produce of the soil. In the present case, the law of the island is not only explicit and supported by the usage of all other lords, but the tenant, who is the present respondent, refusing to pay the said repurchased rent as seigneurial, has, on two different occasions, been condemned by the judgment of the court of the fief, (whose jurisdiction is admitted,) to pay it as a seigneurial rent; and has bound himself on each condemnation, by an agreement now on the records of that court, [*8] to pay it as such forever, under pain of imprisonment in the fief. Hence the respondent is not only bound by the general law of the island, but also by his own particular act of obligation, to discharge the rent as seigneurial.

Dallas, for the respondent. Respecting the general law of the island, no authority whatever has been cited, no text writer has been referred to; the usage alone has been opposed to the dictates of the plainest reasoning, for it is evident that, after the complete alienation of a seigneurial rent, it becomes *routouïriere*. And though it may return, by purchase or otherwise, to the original lord, he can

Lempriere v. Le Brun. 1 Acton.

only hold it in right of purchase or agreement, and not as lord of the fief, having once abdicated this title. Had the judgment of the court of the fief been enforced, as it might, no doubt, the respondent would then have become the appellant in the Royal Court. This, it was apprehended, would give him an advantage; therefore the lord himself had appealed from his own court, (the court of the fief,) where his influence, amongst other considerations, had twice obtained him a decree in his favor, notwithstanding which he was, in the Royal Court, condemned in costs, and the rent determined to be payable as a common rent only.

JUDGMENT.

SIR WILLIAM GRANT. If you admit the two agreements or obligations, which have been signed by the tenant of the fief, there can be no possible mode of getting rid of the obligation to pay [* 9] the rent as seigneurial, notwithstanding the judgment of the Royal Court of the island in favor of the respondent. The contract was not only made, but also adhered to, for some years, when the tenant refuses to abide by his contract, and again is convinced it is his duty to renew the obligation. He again refuses to comply with the terms of the instrument, and the lord, to confirm the right, appeals to a higher jurisdiction, where he fails to obtain the sanction he expected, and, therefore, brings the cause before the Supreme Court. I am not now able to ascertain whether the lord resumes his right by repurchase or repossession. Much would depend on the circumstances under which he entered into possession. Perhaps, and, indeed, from what has transpired, it would appear that the lord only held and derived his title by purchase. But when there are two express covenants to pay this rent, in the manner contended for by the lord of the fief himself, we cannot hesitate in deciding that the decree of the Royal Court be reversed.

The Elizabeth. 1 Acton.

BEFORE THE LORDS COMMISSIONERS.

* THE ELIZABETH, Trip, master. [*10]

June 10, 1809.

A neutral vessel, sailing under the protection of a general British order, although deviating from her final destination for the purpose of landing a passenger, not thereby rendered fair prize.

IN this case a Hamburg ship, sailing in ballast from the island of Martinique, bound for Portsmouth, in Great Britain, was, on the following day, met and captured by the private ship of war Camilla, Peter Graham commander, and carried into Antigua, where she was condemned as lawful prize to the captors, by the judge of the Vice-Admiralty Court of the island; from which sentence the owner, Peter Rucker, merchant and burgher of the free and imperial city of Hamburg, appealed, by the said master of the vessel.

Adams, for the captors. This vessel has been condemned in the court below, from the strongest suspicions of her having been engaged in an illegal trade, and from the proof of property exhibited being incomplete. In most of the ship's papers she has been described as the property of Rucker; but in that certificate she obtained from the custom-house at Martinique, immediately previous to her sailing, she is described as the property of Johan Daniel Kock. But the strongest grounds for her detention and final condemnation appear to be, that, having set sail from Martinique, expressly relying, as the correspondence before the court will show, on the British order of the 18th of February, 1807, she has violated the provisions of that order in two instances: first, in sailing from the island of Martinique in ballast, and not for the purposes of trade; and next, in deviating * from her course after leaving that island, which [*11] originally had been described as for England. It will be found that the order, under which this vessel sailed, had made no provision for the safety of vessels sailing in ballast, but solely for those vessels of Hamburg and Bremen, trading to or from the ports of Great Britain. Thus the manner of sailing, as well as the destination of the vessel, is accurately defined, and no vessel, under any other circumstances but those contained in the order, can have any pretension to claim its protection. This vessel sets out avowedly for Portsmouth, in Great Britain, and is immediately afterwards found

lying off and on, near the island of St. Kitts. This is attempted to be justified, by the necessity she was under to land a passenger in that island, who had interested himself extremely for the protection and security of this vessel in her passage to England. I must, however, suggest, there seems to be no imperative necessity for the ship's endangering herself, by landing this gentleman in St. Kitt's, since the communication between all those islands is very general and frequent. This, therefore, falls to the ground as a defence, and excites a suspicion that she was lying off that island for the purpose of carrying on an illegal trade, of which this supposed passenger was the confidential agent. There seems to be also something extremely suspicious in the mutual interest this passenger and ship take in each other. In Martinique and Barbadoes, he is solely anxious to procure this ship a safe passage, and obtains the opinion of the law officer of this last island, under which opinion expressly the vessel sets sail. Aware of the vigilance of our cruisers, she conforms as nearly as convenient to the order under whose protection she is assured of a safe passage, until she concludes she is out of [* 12] * danger, and immediately alters his course, and runs directly for the island of St. Kitts. There certainly could be no ordinary motive for such an extraordinary change of destination. Here she is captured by the private ship of war *Camilla*, in the direct course for that island. From the concurrent circumstances of this vessel having a false description of property on board, having varied from her course, violated the requisitions of the order mentioned, and the suspicion, it is impossible not to entertain, that she was, if not actually engaged, about to engage, and set sail with the intention to engage in an illicit trade. I am encouraged to hope that the decree of the court below will be confirmed, and the vessel condemned as prize to the captors.

Arnold, for the appellant. This vessel, it appears, had lain some time with a cargo in the island of Martinique, ready to sail for Europe; but her captain, being apprised by Mr. Elbers of his intention to send her to some port of Great Britain, in consequence of the occupation of the city of Hamburg by the French forces, relanded the ship's cargo, as he could not obtain permission to take out the said cargo from the government of that island, in consequence of altering his destination. To this he was advised by Mr. Elbers, who, to secure the vessel a safe passage, had gone expressly to Barbadoes, to consult the law officers there, as to the mode in which she should prosecute her voyage. By them he was informed the vessel might with safety prosecute her voyage, under the protection of the

The Zulema. 1 Acton.

order of the 18th of February. Relying on this assurance, which, also, was corroborated by the opinion of his Majesty's Attorney-General of Barbadoes, the captain, without *hesi- [* 13] tation, cleared out for St. Kitt's, to stand off that island for the sole purpose of landing this Mr. Elbers, to whose endeavors he was exclusively indebted for the prospect he had of returning to Europe with safety. In making for this island, the vessel was captured by The Camilla, privateer, carried to Antigua, and condemned; from which sentence her owner now appeals, and trusts that the nature of the circumstances under which the vessel sailed, the care and caution his friend has observed to insure her a safe voyage, the satisfactory manner in which the proof of property is made out, except in the instance alluded to, which originated solely in an inaccuracy of the port-officer in transcribing the document, and her exact compliance with the order of the British government, (except in procuring a cargo, for which the captain had no funds but in the island of Martinique, but from whence all exportation to this country was strictly prohibited,) will entitle this vessel to the protection of the order, and induce your lordships to pronounce the capture unjustifiable, and sentence the captors to restitution with costs and damages.

Adams, in reply, observed, the captors had never yet been in possession of the proceeds of the vessel.

JUDGMENT.

SIR WILLIAM GRANT. We order the vessel to be restored, and as we are of opinion there appears scarcely any ground for justifying the detention of the vessel, condemn the captors in costs.

*THE ZULEMA, Alston, master.

[* 14]

June 10, 1809.

Proof of a joint property with the enemy in a shipment, subjects such to condemnation. If the shipment be innocent, it does not necessarily affect the ship.

THIS was a case of appeal from the Vice-Admiralty Court of Halifax, Nova Scotia, in which the whole property of the appellants, both in the ship and cargo, had been condemned as prize to the captors, in

consequence of the enemy's being considered to have a share both in the ship and part of the cargo.

The *King's Advocate* and *Daubeny*, for the captors.

This ship has been condemned in consequence of the suspicious papers which have been exhibited in the court below, after permission had been granted to introduce further proof, by which the present appellant failed to substantiate the claim of sole property on the part of Foussat and Mann, and several other American citizens concerned in the ship and cargo. Foussat and Mann are the registered proprietors of the whole ship, and part of the cargo. This claim is, however, vitiated by the suspicious circumstances of the trade in which the parties had long been engaged, as well as by the ship's own papers, and others, which have been invoked into this cause from The Columbian Packet condemned in Bermuda, and also from The Titus. From these papers it appears the parties have been engaged in a trade on false grounds, and for false purposes. Foussat has a brother in Bordeaux, who acts for others in that country as a confidential agent, in making shipments nominally for account of his brother in America, (which the ship's papers prove,) but which the invoked papers give

the strongest grounds to suspect, are for his own and their [* 15] account. Amongst these papers one * is found in cypher, and another without any signature, but which, there is strong reason to believe are the writing of Justin Foussat, of Bordeaux, in which he speaks with great anxiety of a ship, which he in cant phrase denominates his eldest daughter, as containing part of his property, and which the particulars of her cargo mentioned, as well as the apprehension he professes to entertain that she may be finally condemned as prize, prove, almost beyond a doubt, to be The Zulema, which had about the same time been captured and carried into Halifax for adjudication. In another, the writers, merchants of Bordeaux, desire returns for three hundred and eighty-five baskets of oil, which number is found precisely on board The Zulema. The proof of property is therefore insufficient, or, rather, shows it to belong in part to the enemy, and this with the connivance of Foussat, at Philadelphia. If Mann be imposed on, he must seek redress at the hands of his partner. But there will be found no attempt even to prove that he was not also cognizable to the fraud. Hence the parties may be justly concluded to be equally interested in the fraudulent scheme, and the whole property a proper subject for condemnation.

Arnold and *Stephen*, for the appellant — The principal part of the objections, as to the proof of property, are inferential from a mysteri-

The Zulema. 1 Acton.

ous paper. There may be many other reasons for using such papers beside purposes of fraud. The manner, also, of bringing in these papers from the ships *Columbian Packet* and *Titus*, is highly objectionable, no opportunity whatever being given to the appellants to explain them, as they probably could to the satisfaction of your lordships by other documents. One part of the property remains, however, unimpeached, Mann's property in the ship's *cargo, [* 16] and freight. To permit the cargo in this instance to affect the ship, would be to carry the doctrine of prize farther than it has hitherto been attempted. While the points of evidence contained in the invoked papers are, at best, equivocal and uncertain, the original evidence, documents, and affidavits are clear and decisive as to the property of both ship and cargo. If even the identity of the writer of the letter alluded to were proved to be that contended for, there is in that letter no absolute averment of the property. This is merely founded on the strained inferences attempted to be imposed on the court in deficiency of conclusive evidence. There seems to be nothing even in the correspondence between the parties which can lead your lordships to discredit the proof of property; and so cautious have the owners been, that they have desired the appellant, who is their captain, to abandon a claim which had been made for goods, but which since they have ascertained not to be their property, though entered as such in the bills of lading. These goods, it appears, were not put on board by their own shipper, *Foussat*; nor was the master apprised whose property they were until the vessel had almost completed her lading, and, consequently, could not, without great inconvenience, re-land them. The whole appears a fair and open transaction. The proof of property unimpeached, and the owners, therefore, entitled to restitution.

JUDGMENT.

SIR WILLIAM GRANT. The papers which have been exhibited in the court below, seem to produce nearly the same impression as those which have since been invoked into this cause. It appears from many parts of *both these papers that there was a joint [* 17] concern in the proceeds of this cargo between the *Foussats*. The three hundred and eighty-five baskets of oil, mentioned in the letter from the *Bordeaux* merchants, appear clearly to be shipped on their own account, and impeaches the whole proof of property on the part of *Fonssat*. Nor can it escape our notice that this sort of agency seems to have been habitual, and has no other object but that of injuring and evading the belligerent rights of this country. We therefore condemn Mr. *Foussat's* part of the cargo, as well as his half of the

The Titus. 1 Acton.

ship, though by no means as a consequence of condemning his part of the cargo, but from a deficiency of proof in the evidence of property, on which there is not that clearness which we could wish. As he appears the detected agent for covering enemy's property under false appearances, we cannot admit him to the benefit of exhibiting further proof. The cargo being perfectly an innocent cargo, the title of Mr. Mann remains unimpeached, and we therefore order that his half of the ship, as well as his proportion of the cargo and freight, be restored.¹

[* 18]

*THE TITUS, Cushing, master.

June 10, 1809.

Sentence of condemnation reversed in consequence of the shipper in the enemy's country fairly accounting to the neutral owner for the whole freight and earnings of the vessel. The claimants for part of the cargo admitted to exhibit further proof, although the ship is discovered to have mysterious papers on board.

THIS was a case of appeal from a sentence of condemnation by the Vice-Admiralty Court of Bermuda, on the ship and part of the cargo, as the property of the enemy, though claimed for several American merchants.

The *King's Advocate* and *Adams*, for the captors.

In this case, abounding with inconsistencies, the first that presents itself is, that this claim is made by Messrs. Bainbridge & Co., though the owner of the ship, Mr. Dumas, of Philadelphia, has, in a letter of instructions to his master, directed him in case of seizure by British cruisers, to have recourse to his friends, Messrs. Mullet & Co., residing in London, for advice and assistance. The whole transaction appears so replete with deception and fraud, that it will be found almost impossible to lay hold of any thing in one shape, which, on a more strict investigation, will not appear to assume a different form and complexion. We find the vessel described as altogether the pro-

¹ The property claimed by several other citizens of the United States was also restored; as it appeared by the papers exhibited, that they were shipped for their account and risk, and were such articles as were calculated to be disposed of by retail, in the respective shops of the claimants, who reside in Philadelphia.

perty of American merchants, by the attestations of the master and shippers, corroborated by the evidence of the seamen, and confirmed by the papers on board, her pass, bills of lading, and register. This representation is totally overturned and falsified by an investigation of the papers and correspondence, which were evidently not intended for publication. The whole claim is not a little affected by the circumstance of Mr. Foussat (whose ship, *The Zumela*, was, within the present month, condemned by your lordships on account of gross prevarication and fraud) * having thought it his duty [* 19] to abandon a claim in this cargo for wine and plate, which claim was also prosecuted by the house of Bainbridge & Co. until within these few days. This has, perhaps, been effected by the solicitation of Dumas himself, who cannot but be apprised of the danger in which his claim stood, from appearing joined in a claim with a man whose character and connection with the enemy have been so manifestly developed. It will not be difficult to prove this vessel is similarly circumstanced with *The Zulema* just mentioned, and thence will appear to your lordships a property justly subject to condemnation with the costs of appeal. The principle of law, laid down so explicitly in the case alluded to, must embrace the present case; inasmuch as this vessel's papers, and the representations of her owner, attempt to cover the enemy's property, and defraud the belligerent rights of this country. Upon this principle, also, it will not be possible to admit the owner who thus fraudulently misrepresents the cargo, to the benefit of further proof, as to the ship or any part of the cargo. The general species of trade carried on between the ports of Philadelphia and Bordeaux, has been amply elucidated by the case cited, as well as many others not perhaps less in point. Most of the Bordeaux merchants, it appears, have agents in the United States, who have a convenient latitude of conscience sufficient to enable them to cover their employer's property, as that of neutrals. And were it not that persons conscious of fraud in themselves cannot sufficiently confide in each other, and, therefore, defeat their designs, by permitting the deception to become apparent in their private correspondence, wherein they cannot refrain from expressing their anxiety for the safety of this covered * property, and from making repeated [* 20] demands for credit on account, or quick returns for these falsely denominated cargoes, it would perhaps be impossible, such is the calamitous extent of this system of false swearing, that the rights of the belligerent should ever be enforced in cases of this description. It must be admitted, wherever there is reason to suspect a preconcerted system of fraud, there is the less necessity to exhibit positive and direct proof; notwithstanding which, the fraud will be most dis-

tinctly substantiated in the present case, by the papers which were found in her possession at the time of the capture. This vessel is consigned to Justin Foussat, of Bordeaux, whose dexterity in this sort of trade has been already proved. He affects to be the mere agent for the neutral merchant, and while shipping goods for the joint account of himself, Foussat and Dumas, of Philadelphia, describes them carefully on oath the sole property of neutral merchants. This appears most conspicuously in Foussat, of America, having withdrawn the claim made for part of his cargo, a few days since. Mr. Dumas considers his case not so desperate, and, therefore, has appealed. The vessel, he contends, is solely and exclusively his property. To prove this, he produces the ship's papers. But in the correspondence between Foussat, of Bordeaux, and his brother, he describes the whole of the shipment, which he consigns him, as his property; specifies, like an owner, the sort of sales he should be pleased with; and inculcates the necessity of making him quick returns. This letter alone would have completely overturned the claim of Foussat, of Philadelphia, had it not been prudently withdrawn. It is signed by Louis, and addressed to

Charles Le Roy, but from a comparison with that addressed [* 21] by Foussat, to his brother, * and the exact correspondence of circumstances, minute descriptions, and numbers, there can be no doubt entertained that it was intended for Foussat, of Philadelphia, and written by his brother. In the latter part of this letter, the writer requests that a part of the passage money, which he remits by a draft on Foussat himself, may be carried to his credit. Passage money is, however, the earnings of the vessel, and, therefore, can belong only to the owner. In this instance, therefore, it appears that Foussat, of Bordeaux, avows himself a part proprietor. Upon comparing the sum for which he claims credit by the drafts of passengers in the ship, with the passage money, it will be found nearly two thirds of the whole. The zeal, anxiety, and pains which he takes to procure freight, passengers, and the manner in which he reduces the freight in favor of his brother's goods, shipped on board this vessel, prove him more than a mere agent. In fact, great part of the vessel is freighted with goods, for which Dumas appears never to have given any order, and in one letter, which is without signature, but appears also to come from Foussat, and is addressed to Mr. Hector, he advises him of having shipped for his account six tons of wine, which, in another part of this most fallacious correspondence, is said to be for account of Mr. Orthes. This Orthes is supposed to be the brother of Dumas, who had some time before left France on account of his embarrassment, and is perhaps described by this fictitious name in his sister's letter, lest this consignment, in case of capture, should be condemned as the property of a French citizen. These six tons of

The Titus. 1 Acton.

wine are, notwithstanding, found also entered for the sole account and risk of Dumas, in the ship's bill of lading. The representation, therefore, of the cargo of the vessel *appears [* 22] totally false, and can be only intended to conceal from the belligerent the nature of the trade in which the vessel has been engaged. The arrangement which Foussat makes in favor of his brother's part of the cargo, is such as might be expected, and he justifies it by stating that he had procured an equal abatement on a late shipment to the same person, adding also that it was principally as an inducement to other shippers, to freight the vessel, that he had put these goods on board at a higher nominal freight than usual. The property of the enemy, in several instances, is attempted to be protected, by describing it on oath, as that of neutrals, and the property of the vessel itself must appear subject to condemnation, from the circumstance of Foussat's claiming a credit for a considerable share in the earnings of the vessel, which can solely accrue to him as part owner.

Arnold and Stephens, for the appellants — As the counsel for the captors have rested the strength of their case on assimilating it to that of *The Zulema*, and have utterly failed in this expectation, the case of the appellants is thereby rendered the more simple and unembarrassed. With respect to the property of the ship, the proofs are full and complete. She is described by her pass, register, and evidence of the captain, as American property. Dumas built the ship, and continues to exercise the authority of an owner, with respect to the vessel, even after leaving his port, and throughout the whole voyage. The proportion of the ship's earnings, whether passage money or freight, which it is contended was placed to the credit of Foussat, at Bordeaux, is minutely accounted for to Dumas by the drafts of passengers on board, all made payable to himself, and which

* Foussat merely claims a credit for, as the agent of Dumas, [* 23] transmitting by this mean part of the proceeds of his vessel. Of these passengers, some had funds in America, and others had property on board, for which reasons they preferred giving drafts on American merchants for either freight or passage, and some even found it convenient to raise money of Foussat on similar drafts. The property of the vessel remains unimpeached. By the attestation of the master, the documentary and parol evidence adduced, the cargo also is proved generally the property of neutrals. Mr. Foussat, of America, having withdrawn his claim, is a striking feature of integrity in this case, and shows how unwilling the appellants were to have their appeal contaminated by any color of fraud, which it is pro-

The Baltic. 1 Acton.

bable they themselves were only acquainted with within these few days. The only doubtful part of the cargo remaining, is the shipment of wine, made, it is said, by the sister of Dumas, residing in France, to Orthes. Of this person, we are totally ignorant. The letters addressed to Orthes and Hector, one of which is in cypher, because they appear to be mysterious, are not, therefore, to imply a fraudulent intention. They are capable of explanation, and when it is considered how extremely unfortunate in almost every transaction of their lives, some of these correspondents, particularly Orthes, appears to have been, it would be the extreme of cruelty to deny the benefit of further proof to a wretched family, struggling through adverse vicissitude and unforeseen misfortune, with a sincere desire, as they express themselves, of obtaining an honest and honorable competence, by honest and honorable means, especially when [* 24] there is every reason to *believe the property in question is their last stake, and the solitary hope of their future years.

JUDGMENT.

SIR WILLIAM GRANT. From the testimony of the master, so clearly and forcibly corroborated by the ship's papers, and also from the exact manner in which the shipper has accounted to the claimant for the whole of the freight and passage money (the remittance made, appearing exactly to correspond with the earnings of the vessel); we are of opinion the proof of property is sufficient. We, therefore, order the vessel to be restored, and see no adequate reason to preclude the appellants from the benefit of exhibiting further proof as to the property still continuing to be claimed.

[* 25] * THE BALTIC, Donaldson, master.

June 17, 1809.

Concealed contraband on the outward cargo renders the vessel on her return subject to condemnation. The misconduct or fraud of the supercargo attributable in a considerable degree to his employer, and affecting his interests.

THE property of this vessel, with the greater part of her cargo, condemned in the Vice-Admiralty Court of Bermuda, was claimed by W. Vaughan, merchant of London, for Richard Gernon, merchant of Philadelphia, as an American citizen, and sole proprietor.

The Baltic. 1 Acton.

His Majesty's Advocate. This vessel, however, attempted to be clothed with an American character, will necessarily appear, on a review of her conduct from her first sailing on the outward voyage to have quitted her original port with a cargo of goods falsely described, to have made a continuous voyage with these goods from an enemy's port to an enemy's colony, and for the account of the enemy's merchants residing in Bordeaux. This cargo is said to be shipped in the port of Philadelphia, on board the American vessel Baltic, which, with nearly all the cargo, is described to be the property of Mr. Richard Gernon. She is then said to be committed to Mr. Peter Payan, also an American citizen, as supercargo. This gentleman, however, has so far despaired of establishing his claim to that character, that he has deserted a claim made for part of the homeward bound cargo, by the present appellant for his account. This cargo will appear, by the correspondence exhibited in the appendix to the case, to be actually the property of Mr. John Gernon and other merchants residing in Bordeaux, where it was expressly shipped by them, on board the same vessel, which then was named *The Hazen*. These goods were by them consigned to

* Messrs. Buckley & Co., of Philadelphia; and after this [* 26] vessel's arrival there, a false sale of both ship and cargo took place, by which Mr. Richard Gernon is made the nominal owner; a new register is made for this vessel on this alleged change of property, her name changed, a new captain appointed, and every thing being effected which could possibly give a plausible color to the fraud; the vessel sets sail under the charge of this Payan, who, it is evident, from other parts of this correspondence, accompanied her from Europe, as the supercargo for her owners in France. This last fact is proved from Payan's having a power of attorney consigned to him by one Marnin, of Bordeaux, empowering him to collect debts due to him. In this instrument he is described as then at Bordeaux, but residing at a particular street in the Isle of France. Thus Payan is discovered to be not only the agent for the enemy, but absolutely a subject of France, in which his wife then resided. While in the Isle of France he is found busily employed in various speculations, many of which are contrary to the tenor of the instructions received; and some of the cargo claimed for Richard Gernon appears to have been shipped in contradiction to his orders. Several bills of sale appear among the ship's papers in the handwriting of Payan, all made as to different merchants, but evidently calculated to mislead and cover the intended fraud. One paper, affectedly denominated "An account current between John Gernon, of Bordeaux, with Messrs. Saulnier & Co., of the Isle of France, as relating to the cargo

of his ship Julia," exhibits the proceeds of this vessel, as exactly corresponding with those of the Baltic, and is now submitted to be

[* 27] * an account of the sales effected from The Baltic's cargo. In this the cargo appears to be actually of the same value as that of The Baltic; and there is also credit given for an adventure of cordage equal in value to that cordage brought out in The Baltic. This last-mentioned circumstance is alone sufficient to render her lawful prize, as being contraband goods on her outward bound voyage. The funds for the return cargo being deficient to freight her back, Payan received instructions from Gernon, of Philadelphia, to lade her only with such goods as were *bonâ fide* American or neutral property. This caution was unattended to, and in Payan's own account book there is a long list of those goods shipped for the enemy, and even the initials of the several owners affixed to each article, which are, notwithstanding, in the bill of lading described as the property of Gernon, in Philadelphia. On account of Payan's funds failing in the island, he writes to his insurer to reduce his former insurance of \$14,000 to \$4,000, as he cannot raise a fund for any greater proportion of the cargo; yet, in the claim which was made in his favor, there was included value to a much greater amount. This, therefore, proves incontestibly that the representation of the property is altogether deceitful, which is even avowed in part of the correspondence of these inimical merchants, who congratulate their friends in France that the goods shipped to them will have all the benefit of the *acquit a caution* or cocket, by which the property was expected to be secured. The cargo, from its nature, cannot be doubted to be destined to France, the mother country. This supposition is supported by the testimony

of several papers on board, and from several letters directed [* 28] to persons in Bordeaux, which * Payan is requested to deliver in person. Whether they were to arrive then *via* America, or not, appears of little consequence, since there appears no doubt that, at best, it would have been only a continuous voyage from the colony to France. The natural inference, therefore, is, that the whole voyage was undertaken in France, and the proceeds of the outward and return cargoes are solely to be appropriated to the use and profit of the enemy's shippers, either in France or in a colony remarkable only for fitting out privateers, and vessels of war, to the great detriment of the trade of this country in those seas; which last inference is strongly corroborated by the contraband in the outward cargo. Hence it is submitted, the vessel and cargo are equally liable to condemnation.

Adams and Stephen for the appellant. The conduct of the super-

The Baltic. 1 Acton.

cargo has deservedly cast a shade of doubt and suspicion over this transaction, which it will, perhaps, be difficult to remove, even as it appears to affect the interests of Mr. Richard Gernon, whose sole culpability has been the confidence he seems to have indiscreetly reposed in a dishonest agent. His fraudulent design is admitted; but it also is to be considered that he has exceeded, and even violated in many instances, the express letter of his instructions. In the case of *The Bedson*, Captain Jones, however, the owner, under similar circumstances, obtained restitution; and it would be a case of extreme hardship should the owner of this vessel not be admitted at least to the benefit of further proof, when there appears so great a necessity for a careful distinction throughout, in order to ascertain which is really the *property of the enemy, and [*29] which that of neutrals. The accounts exhibited as kept by the supercargo are, taken together, completely unintelligible, except your lordships admit an hypothesis, which the custom of traders will well warrant, namely, that Payan, in order to dispose of the cargo to the best advantage, was in the habit of making out various accounts of imaginary sales, by which he might regulate his conduct when he came into the market. This supposition is strongly supported by the circumstance, that no sale was in fact made on the exact terms computed in these various accounts of sales found amongst his papers. In his letters to the owner, he assures him of returns to the amount of \$49,000, for which it appears he had funds in the outward cargo, and in bills of *Sonia & Co.*, who were the contingent consignees in case of emergency, the vessel being chiefly intrusted to the supercargo under the most definite and express letter of instructions. Throughout the whole transaction there appears the utmost fairness and sincerity so far as respects Mr. Gernon. The distinctions between his property and others are faithfully and carefully made: The claims he now submits are unconnected altogether with those of the enemy, as appears by the most suspicious of the papers referred to. Payan claimed for his own goods, and also those of the enemy, well knowing that Mr. Gernon would not make him a compliment of his conscience to cover the goods as those of a neutral merchant. In one even of these papers, pointed out by the counsel for the captors, is a list of every article belonging to the enemy, and no part of these goods are comprised in this claim.

*[*SIR W. SCOTT.* You must perceive that this adventure is a very considerable part of the whole cargo.] [*30]

'Tis true, in part of the correspondence Payan apprises Mr. Gernon the cargo is his; but this should be taken merely as a phrase applying to the general cargo, for he had received express permission

The Baltic. 1 Acton.

to freight the vessel, provided such goods were neutral property. The letters even of the owner to Payan while in the Isle of France, are abundantly sufficient to point out his property. In these letters the several merchandises he wishes are ordered, and these are also found in the ship at the time of her capture, and for these solely a claim is now set up. The attempt to confound the cargo of The Baltic with that of The Julia, is absurd. The number of bales of each commodity are totally different, though the commodities themselves, it must be admitted, are the same, as they comprise the general exportable produce of the country. Though the Isle of France be not a place interdicted to neutrals, or subject to no peculiar colonial restriction, this vessel appears to have cautiously set out with an almost certain hope of security from proceeding to America, for which country she had several consignments on board. The vessel's character has been attempted to be deduced from the character of the supercargo; and she has even been traced to Bordeaux without any foundation for such a latitude of inference from facts or papers. That an owner should select a Frenchman to act for him in a French colony should not require any explanation; and though his wife reside in France, Mr. Payan is a naturalized American citizen, possessed of a freehold property in that country, and hence protected by the national character. [* 31] *The assumption made from Mr. Payan's name being inserted in the power of attorney, as an inhabitant of a particular street in the Isle of France, is inconclusive as to national character, as these instruments are sometimes left in blank, for the future insertion of any name necessary or convenient to the parties, as is sometimes the case with respect to inheritable bonds in Scotland. The instrument being transferred to Payan in America, was taken out by him, and probably not filled up until his taking a house or apartments while he remained in the island. Whatever may have been the character or conduct of this man, it is necessary, to affect his property, to show that Mr. Gernon, of Philadelphia, was also a party to the intended fraud, or at least connisable. The charge of carrying secretly contraband outwards in any quantity is only supported by the evidence of one person on board, whose testimony should be received with caution, as his evidence is not supported by that of any other person in the ship as to so large a quantity. Two cables and two hawsers only are said by the mate to be disposed of by the captain, which is not improbable, from the low price they brought, were damaged, or old articles taken from the ship's own stores. It is impossible to believe such a sale was amongst the actual motives of the voyage to that island, in which case alone such a traffic would be attended with fatal consequences

The Baltic. 1 Acton.

to her, on being afterwards captured. The enemy's goods on board are openly and avowedly carried as such. Had they been secretly conveyed with a fraudulent intention, the vessel would only have incurred the sentence of condemnation on such part of her freight and cargo; and *if the claimant had been considered [*32] by your lordships as a party to the fraud, in any way, it would perhaps follow as a consequence, that he should be precluded from the advantage which possibly might arise from exhibiting further proof. But this cannot be extended to the present claimant, who seems to have suffered in his credit solely by the insincerity of his agent, and to be in danger of becoming the victim of a fraud not his own.

Dallas in reply — On the circumstance of the concealed outward contraband alone, I might rest the impossibility of attending to the claim of Gernon. With the greatest secrecy imaginable two cables and two sets of standing rigging appear to have been brought out in this vessel, and disposed of, with only the privity of one seaman on board, to the enemy. The circumstance of the concealment too plainly discovers the intention of fraud. A small quantity is taken out in this ship purposely to escape observation or detection. It is worthy of observation, that all the parties engaged are Frenchmen born; Richard Gernon alone appearing to have any title to protection from residence in America; that this cargo is received one day from France and exported the next to her colony; that a new master is appointed to this vessel, aptly suited to carry Mr. Payan's speculations into effect, and totally subservient to his will; that the supposed funds of R. Gernon are precisely the same bills he receives from his brother in Bordeaux. The adventure must then have originated in France, and must have been conducted confidentially for the interest of French merchants.

* JUDGMENT.

[*33]

SIR W. SCOTT. There can be no doubt that Mr. Gernon must have been aware of the fraud intended, if not a confidential party to it. We, therefore, affirm the sentence of the Vice-Admiralty Court condemning the ship and cargo.

THE PENNSYLVANIA, M'Pherson, master.

June 28, 1809.

The master or crew of a neutral vessel captured, not bound to assist in carrying the vessel into port for adjudication. Resistance to the captors by the master or crew must be proved to have been actually made, in order to subject the vessel to condemnation on the principle of rescue.

THIS vessel, on a voyage from Trieste, in the Adriatic, to Canton, in China, was captured by two British cruisers in the Mediterranean, and possession taken by sending three persons on board her, who being unable to navigate the vessel, the neutral captain continued to direct her course according to the instructions of his owners, refusing to carry the vessel into Malta for adjudication, as required by the prize-master. Immediately after passing Malta, she was boarded by a third privateer, and carried into Malta, where the claim of Messrs. Wilcox & Co., of Philadelphia, as neutral and sole owners, was rejected, and the ship condemned as having been rescued from the original captors.

Stoddart and *Harrison* for the captors — This vessel has been condemned in the court below, on account of the resistance she appears to have made to the exercise of the acknowledged belligerent right of search; a right which, if once permitted to be violated by [*34] neutrals with impunity, must involve all *maritime nations in a series of calamities, cruelty, and bloodshed. That indulgence and lenity now shown to vessels boarded on suspicion, would no longer be politic or justifiable; and the interest of the captors would point out the necessity of rigor and severity in compelling vessels, under circumstances of suspicion, to enter those ports best calculated for legally investigating the claims of the respective parties. The evidence of the prize-master who was left on board, corroborated by his own men, and one of the ship's crew, proves, that at the time of his taking possession, he would have obtained more men, in consequence of the captain's suggesting that his men would not work the vessel into Malta, if he had not been assured by him, almost immediately afterwards, that the men had consented, at his request, to navigate the vessel into that port. As soon as the vessel was supposed to be out of the reach of danger from the privateers which made the capture, the captain threw off the mask, and assured the prize-master he would never again carry a ship under his command

The Pennsylvania. 1 Acton.

into port for adjudication, as he had before suffered severely for so doing. He then called his men together, assured them he would not permit the vessel to be carried in, and after demanding the ship's papers, which had been left in charge with the prize-master, and which he surrendered through apprehension and intimidation, the vessel proceeded, by his direction, on her course towards the straits of Gibraltar. The captain assured him of his safety, and promised to send him on board a Danish vessel then in sight. In this state of things she was again boarded by a British cruiser, and carried into Malta. There is no attempt made to impeach the proof of property; but the sole *circumstance of the rescue at- [*35] tempted must appear sufficient to affect the ship and cargo.

(The private adventure of the master having been restored by consent.) Hence it is submitted, the sentence of condemnation should be affirmed, upon the principle which regulated the decision of this court in the case of *The Washington*, where no actual force had been employed, but the existence of a conspiracy to retake the vessel had been considered fatal to the interest of the owners.

Arnold and Stephen for the appellants and owners — In this case there arises a difficulty from the nature of the testimony of two interested parties, who appear to have different motives for giving these inconsistent and contradictory statements. The master, mate, and seamen, with a solitary exception, agree in stating the anxiety of the master to have a perfect capture made of the vessel, probably that he might not be responsible hereafter to his owners for a neglect of their interest, or to the captors, should any attempt be made to rescue the vessel by his crew. The only witness of the ship's crew, who supports the statement of the prize-master, is a person deserving little credit, from the resentment which appears to have actuated him on account of his being punished for disorderly conduct and inebriety. The remaining part of the crew confirm the statement of the captain, that he openly avowed the crew would not work the vessel into port, and that the prize-master in consequence hailed the privateers, demanding more men to navigate the ship. This request was not complied with, solely because there appeared several other vessels in sight, which the privateers were anxious to capture. Independent, however, of the contradictory part of the evidence adduced, there is one point in *which all are agreed, that no force [*36] was employed; and this alone must obviate the inference attempted to be drawn, that the principle upon which *The Washington*¹ was condemned is applicable to this vessel, and will operate on

¹ This case is not reported.

your lordships, to pronounce against the appeal. In that case a dangerous conspiracy was proved to exist, and the crew had been previously armed to carry the proposed rescue into effect. Taking, therefore, that part of the evidence in which all are agreed, that no resistance was made to the prize-master, but that solely in consequence of the inability of the captors to work the ship, the vessel continued to hold on her original course, it remains for your lordships to decide on a very circumscribed, though very material point of law, whether in all cases of capture the master and crew are bound, at the peril of the confiscation of the vessel or her cargo, to navigate her to such port as the prize-masters, or those in custody of the vessel for the captors, shall please to direct.

JUDGMENT.

SIR W. GRANT. We cannot see that any such duty is imposed on the master and his crew. They owe no service to the captors, and are still to be considered answerable to the owners for their conduct. It is the duty as well as the interest of the captors to make the capture sure; if they neglect it from any anxiety to make other captures, or thinking the force already furnished sufficient, it is exclusively at their own peril. In this case the captain performs a duty he [* 37] conceives he owes to the owners. He will not act against their interest, nor will he attempt to prosecute their interest by any violence on his part or that of his crew. Neither he nor they are found to make resistance. The captors, therefore, are left to pursue their separate interests; they are unable to navigate the vessel and the captain resumes his command. What effect a compromise or agreement to navigate the vessel into a particular port, made by the master and his crew to the captain of the privateer, on his capture, (without experiencing any undue influence either arising from apprehension or compulsion,) might have on the master or crew, and whether they might not thereby be comprised within a new obligation, is not now our duty to determine. It might, probably, raise a very different question had any such agreement been here proved. As, therefore, there appears no actual grounds for the detention, and subsequent sentence, we reverse the decree, and order the vessel to be restored, each party paying their respective costs.

The *Jane*. 1 Acton.

* *JANE*, Lynch, master.

[*38]

June 28, 1809.

Notwithstanding circumstances of suspicion in the general trade of an alleged neutral owner, admitted to the benefit of further proof.

THIS was a claim for sixty hogsheads of sugar, part of the cargo of *The Jane*, as the property of Henry Cheriot, of New York, an American citizen. This vessel was captured on a voyage from Martinique to New York, and carried into Antigua, where proceedings were instituted against the ship and cargo, as the property of the enemy. The ship and cargo, except the sixty hogsheads claimed for Henry Cheriot, were ordered to be restored, from which sentence he therefore appealed.

Adams and *Stephen*, for the captors. This claim is founded merely on the testimony of the captain, who grounds his opinion of the property claimed being actually that of Mr. Cheriot, on the circumstance of Mr. Cheriot's having acquainted him that it was his property, and that he has reason to believe it was purchased for him, as a part proceeds of two or three outward shipments to that island. In the captain's answers to the interrogatories no mention was made of Cheriot, though several American merchants were stated to be the sole proprietors of the whole cargo. Considering that the name of Mr. Cheriot is not unknown in the Admiralty Court, and that frequent claims have been made for goods alleged to be his, but which have afterwards been abandoned, it appears rather strange that no attempt has been made, after twenty-six months' interval since her condemnation, to illustrate this claim by the introduction of more *satisfactory proof. Under these circum- [*39] stances it is submitted the court will at once proceed to condemn the goods as the enemy's property.

Arnold, for the appellant, submitted to their lordships that he was instructed to require permission to present further proof, as to the property. It consisted of a series of letters and an affidavit, which would remove all shadow of doubt on the subject of property.

SIR W. Grant directed that further proof should be introduced.

JOHN, Mosher, master.

June 27, 1809.

Ship and cargo restored.

Perishable commodities, carried from the enemy's country to a neutral port, with a *bonâ fide* intention of disposing of them in that port, permitted to be exported to the enemy's colonies, in consequence of being unable to sell them, as intended.

IN this case the master of the brigantine John, on behalf of the asserted owners, appealed from the sentence of the Vice-Admiralty Court of New Providence, condemning the ship as engaged in an unlawful trade with the enemy's colonies, and part of the cargo for deficiency in the proof of property. The asserted proprietors were Messrs. Lippert and Rogers, merchants of Providence, in Rhode Island, for whom the claim had been originally made, as citizens of the United States. Prior to her final condemnation the judge had ordered further proof, on which part of the cargo had been restored.

Swabey and *Stephen*, for the captors. This vessel has been detained and finally condemned, with part of her cargo, from [* 40] a conviction in the mind of the judge in the * court below that the pretended importation of the goods in question was fraudulent and collusive, and that the owners were engaged in a course of traffic unauthorized by the general law of nations, and contrary to the tenor of his Majesty's instructions. This vessel had set sail from New Providence for the Havana, with a cargo of goods, principally provisions and spirituous liquors, which had been but a few days before imported in a vessel, *The Columbia*, direct from Amsterdam. This last vessel had, it appears, been engaged for a length of time in a trade from Holland to the port of Providence, importing the produce of that country, which, almost as soon as landed, were shipped on board her associate in this contraband trade, (*The John*), and conveyed by this circuitous mode to the enemy's colonies. An offence of this nature could not be too severely punished; but the guilt was considerably increased by the reciprocal advantage the enemy was found to derive from the supply of colonial produce, which, by the same circuitous mode, was continually pouring into the ports of Holland, and other enemy's ports in Europe, through the medium of the two vessels mentioned, conjointly with a third, whose last voyage appears to have been from Trieste, and part of whose cargo found, at the time of the cap-

The John. 1 Acton.

ture, on board *The John*. The claimants have endeavored to justify this trade, by different attestations of themselves and others that these goods were originally destined for sale on their arrival in Providence; that part of them was sold there, and on the continent of America; that, after exposing them to sale at auction and otherwise, they were compelled to ship them for the Havana, being perishable commodities; and that this circumstance sufficiently justified the trade in which, *from unforeseen accident, they [*41] were compelled to engage in. Notwithstanding their design explicitly appears to have solely in view to color this trade, in itself so fraudulent, the ship papers, by which it was hoped a legal complexion might be given to the whole transaction, were replete with inaccuracy, misrepresentations, and suppressions of so glaring a nature, that it was apparent they had been constructed for the purpose. In the voyage of *The Columbia*, the master, though directed to repair to St. Petersburg for part of his return cargo, takes the liberty of returning direct from Amsterdam, assigning some vague reasons for his conduct. In the same manner the master of *The John*, at the Havana, violates the instructions of his owners, and brings to Providence an assortment of goods differing in quality and price from those ordered by the asserted owners. This is attempted to be justified on the plea of his acting as supercargo, with a discretionary power vested in him for the benefit of the owners. These vague attempts to cover a fraud so glaring will most clearly be exposed, on an examination of the ship's papers and the correspondence relating to the colonial and European cargoes, and most probably induce your lordships to consider the trade illicit, and the ship and goods claimed subject to condemnation.

Dallas and *Jenner*, for the appellant. The question before the court is extremely circumscribed and simple—Was this a continuous voyage? This is negatived by the circumstance, that the goods, on arriving by the ships *Nancy* and *Columbia*, of whose cargoes *The John's* was composed, were landed and exposed to sale; a considerable part of *The Nancy's* was disposed of, arising, probably, from its superior nature, and a *considerable por- [*42] tion of it was stored in the United States. The *Columbia's* cargo being perishable, and having no great demand, was not likely to be disposed of before it should be considerably reduced in its value; a greater proportion of her cargo, therefore, is shipped for the Havana, as a ready market, as well as for other ports in the United States. The judge in the court below restored the part of the cargo imported by *The Nancy* from Trieste, as an admitted

The Hope. 1 Acton.

neutral port, and ordered further proof of the remaining part of the cargo's having been imported with a *bona fide* intention of disposing of it in the United States. It has been improperly asserted that this vessel was exclusively engaged in this sort of trade; the fact is directly the reverse. During the five years the captain has known her she has made various voyages to different ports; sometimes returning in ballast, and at others supplying Gibraltar with provision. Since the sailing of The John, a great proportion of The Columbia's cargo was sold in America, which indisputably proves the real intention of the owners to be consistent with their neutral character; and even of that carried out in The John a considerable portion had been purchased by the captain, and carried out by him as his own venture. Hence it is just to infer, that the intention of the claimants was perfectly justifiable and upright, and that the property claimed should be restored.

JUDGMENT.

The goods were ordered to be restored to the claimant, and the costs of the captors granted.

[*43]

THE HOPE, Dobell, master.

June 27, 1809.

Condemnation of a shipment of the enemy's colonial produce, though colorably transferred to a neutral merchant, and bills given for the amount.

THIS was a claim preferred by the master of the vessel, for a quantity of tea and sugar, part of her cargo, as the property of J. P. Longchamp, citizen of the United States of America, which, with the remainder of the cargo, had been condemned as prize in the Vice-Admiralty Court of Halifax, in Nova Scotia.

The *King's Advocate* for the captors. The manner in which this claim is attempted to be supported is a further illustration of that system adopted by the enemy's merchants, for supplying the mother country with the produce of her colonies. The property now claimed was landed but a few days preceding its reshipment for Messrs. Chageray & Co., of Bordeaux, from Guadaloupe and the Isle of France, for a Mr. Halbran, who is detected, by a correspondence annexed to

the case of *The Falcon*, (which is on the list of causes for your lordships' decision, and which has been invoked into this cause,) to be engaged as agent in America for this house of Chageray & Co., under a special contract executed at Bordeaux, by which he was empowered to act for their interest, in making colorable shipments and consignments to them in Bordeaux. Of the profits arising from this trade he was to derive one third, and, to facilitate this fraudulent scheme, immense credits had been opened for him by these Bordeaux merchants in various parts of the colonies, in Hamburgh, and in France. By these means, it was expected that a most extensive commercial communication could be kept up between the French colonies and the mother country, or her European acquisitions; * and the contract stipulated that this agency [*44] should continue for the space of three years, for the mutual benefit of the parties. Happily, however, this has been developed by the papers of *The Falcon*, which have assisted in enabling us to prevent the success of a fraud, which might have been carried on with the assistance of any kind compliant third party, such as Mr. Longchamp, to the great injury of this country, and without much apprehension of detection, the fraud of these ingenious gentlemen having been concerted with very considerable dexterity. The facts of the case require little elucidation; the papers furnished by the appellants themselves invalidate their claim. They admit the goods are the produce of the enemy's colonies, or were imported from thence by the ship *Peace* but a few days previous to the reshipment for Bordeaux; that these goods were consigned by Ludlow & Co., of the Isle of France, to Dashwood, of New York, subject to the orders of Chageray & Co., of Bordeaux; that these goods were accordingly delivered to Halbran, under orders from Chageray & Co., of Bordeaux; that a sale took place of the goods, for which Longchamp passed his bills at long dates. These goods are put on board, and consigned to Chageray & Co., by Longchamp, nominally for his own account and risk. The fraud requires no further explanation, since it is impossible not to see that these persons have merely a fictitious property in this part of the cargo, which has been transferred from one to the other without receiving any valuable consideration, and merely to give a feasibility to the transaction; nor can your lordships hesitate to condemn the property, as clearly detected to be that of the enemy.

**Soddart* and *Stephen*, for the claimant—There is the [*45] most just reason to object to the introduction of the papers so improperly invoked, if at all invoked, into this cause from *The*

The *Sophia Elizabeth*. 1 Acton.

Falcon. There has been no sufficient notice given of the intention to introduce them ; consequently, all explanation on this part of the evidence, is impossible, not having been furnished with any matter to elucidate or explain this contract, contended to have been made between Halbran and Chageray & Co. The ship's papers themselves, the attestation of Longchamp, the belief of the master and crew, strongly establish the claim disputed. Longchamp is no where accused of knowing the goods were originally the property of Chageray & Co., or their agents. The bills continue afloat eight months after the purchase is made, and are negotiated into the hands of persons not at all connected with the sale in question. The papers in the appendix prove the transfer of property to be fair and unimpeachable, and these were the only papers ever introduced into this cause in the court below. It is admitted the goods were consigned from the French colonial house to the firm of Ludlow & Co.; that these were transferred to their resident partner, a neutral merchant in New York, to be consigned to Halbran. But it cannot be contended that this is a necessary proof of preconcerted fraud. If so, all the parties must have been acquainted with the fraud, and accessory. This introduction of three distinct parties unnecessarily into the scheme for imposing on British cruisers, appears strange in the extreme, when Ludlow & Co. could as effectually cover the fraudulent design at once, by shipping them for the account of neutral merchants. From the facts proved by the papers really in the cause, nothing can [* 46] * be inferred to affect the interest of the claimant, and against the introduction of *The Falcon's* papers, we feel it our duty strongly to remonstrate.

JUDGMENT.

The goods claimed for Mr. Longchamp, were condemned as the property of the enemy.

THE *SOPHIA ELIZABETH*, Prot, master.

June 30, 1809.

Condemnation for a breach of blockade of the rivers Elbe and Weser.
Relaxation of blockade made in favor of the Hanse Towns by the British government in 1806, not sufficient to sanction a foreign trade to the ports of the enemy.

THIS was a leading case of appeals from the sentence of the High

The *Sophia Elizabeth*. 1 Acton.

Court of Admiralty, condemning *The Sophia Elizabeth*, and two other vessels similarly circumstanced, for a breach of the blockade of the rivers Elbe and Weser. In the High Court of Admiralty, a claim was made for the cargo, as the property of F. W. Schultz, and others, burghers and merchants of the imperial city of Bremen. The cause came on for hearing, and the judge directed it to stand over, in order to enable the parties to obtain information with respect to any permission, from his Majesty's government, for the transportation of goods in small vessels between Bremen and Tonningen, during the blockade of the Elbe and Weser; and finally condemned the cargo, as prize to the captors.

Jenner and *Stephen*, for the captors — The arguments which may be made use of on this occasion, are applicable to three other cases of appeal now on your lordship's list, under similar circumstances; and the decision in this case will necessarily involve the fate of the cargoes of the other two vessels, which have also been claimed as the property of neutral merchants. The first and most material question for decision is, whether the voyage which this vessel had *undertaken, was a breach of the blockade of the river [* 47] Weser. By an order of council, on the 16th April, 1806, the rivers Ems, Weser, and Elbe, were declared to be blockaded, and notice generally given of this circumstance. Immediately afterwards, application was made to the British government for a relaxation of the blockade, so as to allow the inhabitants of the Hanse Towns to carry on their trade by a navigation in small vessels over the Watten or Flats, in the same manner as had been permitted in the former blockade. This permission was granted, as appears by the letter of Mr. Thornton, dated May 20th, 1806, particularizing the free passage of the Watten between the Eyder, Elbe, Weser, and Jahde, to be permitted, in the same manner as had been before granted to lighters and small vessels. The reason assigned by the petitioners for this permission, was its necessity, in order to prevent the remaining trade of the city of Bremen being transferred to Embden, and the terms on which the grant had been made in the former instance, in 1804, were, that the permission should not be abused, or any advantage taken so as to compel his Majesty to revert to all the strictness of the blockade. The same reason existed for this requisition in 1806; and if not actually expressed, it was perfectly well understood that on such terms alone, the permission would have been granted. On the 16th of May, another order of council was issued, declaring the ports from the Elbe to Brest harbor, in a state of blockade. By this order, no vessels were permitted to clear out from any of these ports, except those neutrals

not laden in any of the ports of the enemy, or destined thereto, and whose cargoes neither consisted of enemy's property, or con-

[* 48] traband of war. Of the nature of this order the *inhabitants of Bremen were perfectly aware, as, in the correspondence annexed, a letter from one of the parties, dated the 31st of May, proves. Notwithstanding which, the claimants, on the 5th of July, entered into a charter party to freight the vessel with goods for Algesiras, in Spain. The claimants, despairing of being able to procure a free passage for the vessel, with her cargo on board, out of the mouth of the Weser, sent her in ballast to Tonningen, and informed the master that a cargo should immediately follow her in lighters over the Watten to Tonningen, as the only probable means by which the vessel might escape the vigilance of the British cruisers. The vessel arrived at Tonningen, when she took on board the cargo thus conveyed after her, and sailed from thence on the 20th of August, for Algesiras, on the passage to which place she was captured, and carried into Plymouth. From a review of the mode adopted for procuring this vessel a probability of a safe passage, it must appear, that with the most accurate knowledge of the intention of our government, and the extent of relaxation granted in favor of the inhabitants of Bremen, the claimants had deliberately planned, and so far executed a fraud, which, if now permitted to pass unpunished, would hereafter afford a precedent for practising, with success, on that lenity and forbearance which has ever characterized the execution of the offensive or defensive operations of the British government, where the interests of neutral nations has been materially concerned. Hence, should the court be induced to confirm the sentence appealed from, the claimants cannot possibly object that they are overtaken by any unforeseen calamity or hardship. They were aware of the consequences of en-

[* 49] gaging in a trade *violating the express letter of the order announcing the blockade; and the only hope they could entertain of succeeding, was in evading a search after the vessel had, by this artifice, passed the blockading squadron, on her way from Bracke, in the Weser, to Tonningen. It is intended to justify the conduct of these persons by attempting to prove, that the relaxation granted in consequence of Mr. Fox's letter to Mr. Thornton, dated the 9th of May, was applicable to the subsequent order for the blockade of all the ports from the Elbe to Brest, inclusive. This cannot be even inferred from the terms of either Mr. Fox's or Mr. Thornton's letter, in both which particular reference is made to the navigation of the Watten, and in the last, there is contained a detailed statement of the manner in which this indulgence is to be granted, and an enumeration of those vessels actually within the limitation or scope of the

The *Sophia Elizabeth*. 1 Acton.

relaxation. Throughout, there appears to be no understanding whatever that it was intended, after the notification of the 16th May; to permit these cities the liberty of foreign commerce; and, least of all, can it be supposed that there was any intention on the part of government to permit any foreign commerce with the enemy's ports, when the order for a general blockade expressly prohibits the entrance or exit of any neutral vessels laden with the property of the enemy, or coming from or destined to the enemy's ports. The only relaxation that was ever intended, was comprised in permitting a communication between neutral ports. The sole remaining grounds of defence on which they can with any degree of confidence rely, is to prove, either that this was not a continuous voyage from Bremen by Tonningen to Algesiras, or that the vessel was not captured *until after the removal of the blockade. This vessel, it is [* 50] admitted, however, was captured on the 16th, whilst the blockade was raised on the 25th of September following; and the circumstance of the cargo's accompanying the vessel to Tonningen, proves that it was a continuous voyage. It is true, that in the case of *The Maria Monsees*,¹ when a somewhat similar relaxation of the blockade of the Weser was proved to have taken place, the judge of the High Court of Admiralty extended the benefit of that order for relaxation to a foreign commerce by neutrals, though not absolutely within the letter of the admiralty order. But here there is no room for any latitude of construction; the terms specifying the relaxation, are precise and defined, and the enemy's ports absolutely interdicted by the subsequent blockade. When so considerable an indulgence had been granted by the belligerent to neutrals, at their own urgent solicitation, the attempt to counteract the effect of a blockade, founded on the principle of political necessity, deserves exemplary punishment; and when the claimants are detected in availing themselves of this indulgence, to make a colorable voyage from Tonningen to the enemy's port, with papers calculated to support this fraudulent intention, the court will be, no doubt, induced to confirm the sentence appealed from, and condemn the appellants in the captor's expenses.

Dallas and *Arnold*, for the appellants — In the court below, the claimants have been unable to procure that documentary evidence upon which they principally rested their hopes of establishing their claim. In searching amongst the papers of the secretary of state's office, two material documents were missing, *which [* 51]

¹ Robinson's Reports, vol. vi. part 2.

The Sophia Elizabeth. 1 Acton.

there is reason to apprehend might have made a considerable alteration in the merits of the case, had they been exhibited to the judge of that court. These have, since the sentence, been obtained, and are now amongst the papers of this cause. From the whole tenor of the official letters which passed respecting the relaxation of the blockade of the Weser, it must appear, that a reference is made to an intention of government, by some specific order, to apply a remedy to the grievance of which they complained. In the letter of Mr. Fox of the 9th of May, he assures Mr. Thornton, that such is his Majesty's wish; and that as soon as possible a new order shall be made out for that purpose, permitting him in the meantime to act as if this order had really been issued. Hence, it appears plainly there is a reference made to an order which then seems only to have existed in the minds of his Majesty's ministers, the extent of whose indulgence the appellants, amongst others, were no doubt encouraged to hope, from the prompt acquiescence with which their application had been received, would have been proportioned to the pressure and inconvenience of the grievance against which they had so successfully remonstrated. Upon the receipt of Mr. Fox's letter, Mr. Thornton proceeds to notify the gracious disposition of his Majesty, and *pro tempore*, or while this new order was framing, issues such orders to the naval commander on the station as he presumes may remove all ground of complaint, and anticipate the intention of government. Mr. Thornton's letter absolutely embraced the Ider amongst the rivers along the Watten to which the coasting trade was intended to be permitted, and also provides for the safe passage of all neutral [* 52] vessels in ballast into and out of the Weser. * The cargo is carried out without being subjected to examination, under the protection of the first provision, and the vessel herself clears out for Tonningen under that of the second. The blockade of the Weser is thus strictly and literally understood, and complied with by the claimants, and so far there appears no necessity for the existence of the order, which Mr. Fox had promised, but which appears never to have been issued, for rendering these two voyages perfectly legal, even taking them as connected parts of the same transaction. The vessel and her cargo having arrived at Tonningen, there existed no prohibition to her sailing with it to any permitted port, provided the cargo itself was legal. She was, therefore, at liberty to prosecute a foreign commerce; and this, it must be admitted is the material question to which your lordships' attention should be principally directed. If there had been no relaxation, this conduct would undoubtedly amount to a breach of the blockade; but the moment the vessel was fairly out of the mouth of the Weser, she must be ad-

The *Sophia Elizabeth*. 1 Acton.

mitted to be as much at liberty, as to the manner of conducting her trade, as if she were in any free port in Europe. This consequence must follow from a consideration of the terms of Mr. Thornton's letter alone, which states the relaxation to be granted in the same manner as during the late blockade; and here it is necessary to refer to the case of *The Maria*,¹ seized in consequence of the former blockade, on a voyage from Varel, on the *Jahde*, to America. She had sailed in ballast from Bremen to Varel, under the relaxation of the blockade of the *Weser*; her cargo had been sent after in lighters, and transhipped at Varel, from which port she last cleared out. The circumstances of the voyage *were precisely similar, except [* 53] that the present vessel took in her cargo at *Tonningen*, and was destined to Spain. The circumstance of her destination is, however, perfectly immaterial; for if a permission to maintain a foreign commerce be contained in the order of relaxation, the vessel is altogether at liberty to proceed on any legalized voyage. The difference of shipping ports is also unimportant, Varel and *Tonningen* being equally out of the limits of the existing blockades. Under these circumstances of similarity, the decision of the judge of the High Court of Admiralty in that case must be considered peculiarly applicable to the present, especially when it is considered, that the relaxation in the present case is stated in Mr. Thornton's letter to be granted precisely in the same manner as in the case of the former blockade. In giving judgment, Sir W. Scott observed, that considering the nature of the communications which had passed between the accredited agent of the city of Bremen, Mr. Groning, and Lord Harrowby, then secretary of state, he was of opinion "that the passages cited to him in their natural sense applied to the external commerce of the city of Bremen. The object of the application is stated to be to prevent the remaining commerce from being transferred to the city of *Embsen*. What commerce must we suppose to be meant? not merely the little commerce of Varel, but the remaining portion of the maritime commerce of Bremen." In commenting on those passages of Mr. Groning's letter to Lord Harrowby, complaining of the want of warehouses in Varel, the impracticability of a land passage from thence to Bremen, and the little danger there is to apprehend, that lighters passing along the *Watten* will resort to the territory occupied by *the [* 54] French, the learned judge states it to be his opinion, that, in the continuation of the blockade under the relaxation then procured by Mr. Groning, it was solely the intention of the British government,

¹ See page 50.

The *Sophia Elizabeth*. 1 Acton.

to prevent a direct communication with Bremen by ships from sea, and the touching of these small vessels on the parts of the coast occupied by the French. "These consequences," he continues, "they say could not happen; and that representation is material, I think, in fixing the interpretation of that admonition against abusing this relaxation, contained in the answer of the British government. The thing," he observes, "is asked in terms pointing to this kind of trade, and the answer appears to grant the permission in the terms of the petition. The claimants were, therefore, justifiable in the particular trade which they have been carrying on, and are, therefore entitled to restitution."¹ Should it be objected, that the relaxation by Lord Harrowby only provided that the trade of Bremen should be carried on by lighters navigating exclusively between the river Weser and Jahde, and not between the river Weser and Tonningen, it may be sufficient to direct your lordships' attention to a similar indulgence granted to small craft and lighters to coast along the Watten, between Hamburg and Tonningen in the following year, by an order of council. This order, in conjunction with the known spirit of liberality which actuates his Majesty's councils, relative to these neutral cities, no doubt encouraged these merchants to hope that the communication between the port of Bremen and Tonningen was intended to be included within this relaxation. And even were it to be your

lordships' opinion that this permission is not contained in [* 55] the relaxation, as it relates to the passage * of the Watten generally, yet the case of the claimants cannot be materially affected by this circumstance, inasmuch as the permission to large vessels to proceed from the Weser in ballast, and to lighters to carry on the trade of Bremen over the Watten, amounts to a justification of the trade in which the vessel was engaged, since no restriction whatever was expressed or understood to be imposed by the blockaders on such large and small vessels, once they had passed the mouth of the blockaded river, except that restriction which had in the former order been imposed respecting the touching of lighters on those parts of the coast forcibly occupied by the enemy's troops. Hence, we are inclined to hope your lordships will permit the production of further proof as to such parts of the cargo as appears not sufficiently ascertained, and order restitution of the remainder.

JUDGMENT.

SIR W. GRANT. There can be no doubt, that either referring this

¹ Robinson's Reports, vol. 6.

The Sophia Elizabeth. 1 Acton.

voyage solely to the order of the 16th of April, or to that of the 16th of May, it would have been illegal. It remains to see, therefore, how far these orders are affected by the relaxation granted by Mr. Thornton's letter to the commander off the station. And here it is necessary to observe, that taking the former relaxation, during Lord Harrowby's secretaryship, as the measure of the general extent and principle of the present, it appears doubtful whether this particular communication between Bremen and Tonningen can be considered as included within the principle of relief extended by government, in permitting the free passage between Hamburg and Tonningen in 1805, and between Bremen and Varel in *1804. [* 56] The different orders must be taken as applying specific relief to particular grievances experienced by the cities of Bremen and Hamburg. Mr. Thornton's letter, however, is decisive, and includes the free passage of four rivers, the Eyder, Elbe, Weser, and Jadhe, by lighters and small vessels. The blockade of the 16th of April had cut off all the trade of that river, except under the protection of the Danish flag, or proceeding to or coming from ports of the United Kingdom; this, therefore, required relaxation, and Mr. Fox's letter must have intended to effect that measure of relief, and pointed to some order then in contemplation; but which, perhaps, had not afterwards been deemed necessary. The order of the 16th of May followed, which appears to have made considerable provision for the protection of neutral trade, though announcing a more extensive blockade from the Elbe to Brest inclusive. By this, neutral ships with neutral cargoes, not including contraband of war, were permitted to carry on this trade in these ports, provided such vessels were not laden in, or destined to an enemy's port. Hence, it would be absurd to imagine that it was intended to let the smaller vessels out with cargoes destined for those interdicted ports. We are of opinion, that the export, therefore, to all the enemy's countries was absolutely interdicted by the express letter of the order of the 16th of May, announcing the general blockade. We, therefore, decree that the sentence of the court below be affirmed.

Upon the same principle, THE CHARLOTTA SOPHIA, Moller, master, and KLEIN JURGEN, Prott, master, both sailing in ballast from the Weser to *Tonningen, and there taking in cargoes [* 57] which had accompanied them over the Watten, which were afterwards taken in the prosecution their voyage under charter-party to Algeiras, were condemned as prize to the captors, and the sen-

The Nancy. 1 Acton.

tences of the judge of the High Court of Admiralty, from whence these appeals had been interposed, confirmed.

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THE NANCY, Hurd, master.

July 6, 1809.

Blockade of Martinique. The vessel contended to have committed a breach of the blockade, restored; the blockade squadron having gone on an expedition to Surinam, and left no adequate force behind to maintain the blockade.

THIS was a leading case of several appeals from Vice-Admiralty Courts in America and the West Indies, condemning the ships and cargoes for a breach of the blockade of the island of Martinique, in the year 1804.

The attestation of the master, who was the claimant of the vessel for himself and other American citizens, and of the cargo as the property of John Juhel, also of New York, in America, proved that he had, under charter-party, agreed to sail with a cargo from New York to the port of St. Pierre's, in Martinique, unless the same should be blockaded, and to bring from thence a return cargo of the produce of the island, for the sole account and risk of Juhel and other American citizens. That in case the island should be blockaded he had agreed to proceed to St. Thomas's, from whence he had orders to procure a return cargo from the proceeds of the outward. In pursuance of this agreement he arrived off Martinique on the 29th of March,

[* 58] and finding no ships of war there, and not * being given to understand that there existed any blockade at that time,

he, in consequence of the vessel's having sprung a leak, repaired to the port of Trinity in that island to refit, from whence he set sail, and arrived at that of St. Pierre's on the third of April. That while in the island he was informed the blockade had been removed, and the squadron had gone on an expedition to Trinidad. No vessel of war, whatever, had appeared off the island during his stay; nor was there any notice given of a blockade then existing. Having completed his cargo on the 15th, he sailed for New York, in which voyage he was captured and carried into Halifax, in Nova Scotia, when the vessel and cargo were condemned as prize. This statement was supported by the evidence of a passenger on board the vessel, by some of the crew, and by the tenor of a correspondence between

The Mentor. 1 Acton.

persons in France, New York, and Martinique, which proved that the blockade was at that time removed, or at least so far relaxed that no armed vessels had been seen off these ports during the period the vessel remained in the island.

For the captors it was contended — that although the blockading fleet had been despatched to Surinam, a force had been left off the island to continue the blockade, and apprise vessels of its existence. This appeared even by the correspondence exhibited by the claimants, one of the letters admitting, that a British fifty gun ship continued off the island, and was now and then seen by the inhabitants.

JUDGMENT.

The court held, that to constitute a blockade the intention to shut up the port should not only be generally made known to * vessels navigating the seas in the vicinity, but that it was [* 59] the duty of the blockaders to maintain such a force as would be of itself sufficient to enforce the blockade. This could only be effected by keeping a number of vessels on the different stations, so communicating with each other as to be able to intercept all vessels attempting to enter the ports of the island. In the present instance no such measures had been resorted to, and this neglect necessarily led neutral vessels to believe these ports might be entered without incurring any risk. The periodical appearance of a vessel of war in the offing could not be supposed a continuation of a blockade, which the correspondence mentioned had described to have been previously maintained by a number of vessels, and with such unparalleled rigor, that no vessel whatever had been able to enter the island during its continuance. Their lordships were therefore pleased to order that the ship should be restored, the proof of property being sufficient, but directed further proof as to the cargo claimed for the American citizens mentioned.

* THE MENTOR, Whitney, master.

[* 60]

July 6, 1809.

Condemnation for a breach of blockade.

In the Prize Court of Antigua this vessel had been claimed on behalf of his Majesty, by the Advocate-General, as a droit of admi-

ralty. This had been rejected by the judge. Part of the adventure of the master, and those of the mate and mariners, had been ordered to be restored, and the ship and remainder of the cargo condemned for breaking the blockade of Martinique.

Stephen and *Swaby*, for the captors, proved, by the letters and despatches of the captain-general and colonial prefect, at Martinique, to the minister of the marine and colonies, at Paris, that the blockade had been most rigorously enforced, insomuch as to excite apprehension that the place would be compelled, by the deprivations experienced, to surrender to the British squadron; that this blockade continued at the time the vessel entered the port of Fort Royal; and that the master had even been apprised by his owners' letter of instruction, that the blockade of Martinique might still be continued. If this surmise should prove true, he was ordered to lie in St. Lucia, awaiting the probable surrender of the island to the British forces, in which case he was to repair thither as the most advantageous market. These instructions contained an assurance, that should the vessel be in Martinique at the time of the surrender, the terms of the late treaty between Great Britain and the United States

[* 61] would protect her from detention. * From all these circumstances there was no reason to doubt that the blockade was known to the master, and that he had been induced to hazard the vessel, from the superior advantages to be derived from disposing of his cargo in the blockaded port.

Bowtler, for the claimant, contended, that the instructions of the owners were merely prospective and conditional, neither they nor the master at the time being aware of any blockade existing previous to the vessel's sailing; that he acted under this impression, and entered the island totally ignorant of the blockade. That there did exist no actual blockade at the time of the vessel's going into port, not a single vessel of war appearing in sight of the harbor, or in the neighboring seas through which he passed. That even by the tenor of the sentence of the Vice-Admiralty Court, restoring one part of the master's adventure and not the rest, it appeared the judge had not decided on the ground of any supposed breach of blockade; and that, even admitting the blockade to exist, it had not been known by the master so as to affect the case, until after he had disposed of his outward and purchased a return cargo, of which one third had actually been put on board.

The Robert. 1 Acton.

JUDGMENT.

The sentence of the court below, condemning ship and cargo, was confirmed.



*THE ROBERT, Thomas, master.

[* 62]

July 6, 1809.

Condemnation of a neutral entering a port under a blockade *de facto*, although a justification attempted by pleading ignorance of its existence.

ADAMS and *Stephen*, for captors, proved this vessel, from the papers found on board, and those invoked into the cause from *The Samuel, Evans*, to have entered the port of St. Pierre on the 21st of May, which was then rigorously blockaded, and daily expected to surrender. During the whole time, whilst in the harbor, she could perceive a lugger belonging to the blockading squadron close in shore, which sometimes was supported by other vessels. The vessel had purposely entered in the night, to avoid the blockading force; and by the supplies which she, in conjunction with others, had introduced into the island, the garrison had been enabled to continue its defence, and prevent that surrender which had been the object of the blockade.

Dallas, for the claimant, stated, that the master had received only conditional instructions from his owners to enter this port, should the blockade be discontinued; should that not be the case, he was to make *Trinidad* or *St. Lucia*. Being informed, on the voyage by Captain *Johnson*, of *The John and Jane*, that the blockade had ceased, he entered the island in company with that vessel, and was totally unacquainted with the blockade, if any really existed. It had been decided in the leading case of *The Nancy, Hurd*, that a considerable force, sufficient in itself to intercept intercourse generally with the port, was necessary in order to constitute a blockade. Admitting that the solitary *lugger mentioned [* 63] continually maintained its position near the harbor, it could not, therefore, be inferred there existed a blockade *de facto*, and consequently, on the principle laid down in the first of these cases, the captors should be condemned to restitution, with costs.

The Nancy. 1 Acton.

JUDGMENT.

The sentence of the Vice-Admiralty Court of Antigua, condemning the vessel, was affirmed.

NANCY, Woodberry, master.

July 6, 1809.

Under particular circumstances, a single vessel may be adequate to maintain the blockade of one port, and coöperate with other vessels, at the same time, in the blockade of another neighboring port.

THIS vessel had been restored in the Vice-Admiralty Court, in consequence of a deficiency of proof on the part of the captors, who were unable to obtain an affidavit of the blockade of the port of Trinity at the time of the capture.

Arnold and *Gostling*, for the owner. This vessel sailed from Trinity, on the 25th of May, about which period the correspondence of the governor of the island with the French minister of marine states that a frigate showed herself, from time to time, off the port of Trinity, with an intention to cut off supplies. The station of this vessel was sometimes off Trinity, and at others off another port, more than seven miles distant. Such an interruption to the trade of these ports could never be considered an actual blockade, and, therefore, [* 64] fore, the * sentence of the court below, restoring the vessel, was perfectly justifiable.

Swabey and *Stephen*, for the captors. The sentence of the court below proceeded merely upon the ground of insufficient proof of the existence of the blockade. This is now altogether obviated; the invoked papers, with the affidavit formerly deficient, prove that it existed. The extensive range of the frigate mentioned was perfectly consistent with the objects she had in view, the blockade of Trinity, and a coöperation with the vessels on the other station. From the activity of the cruisers off this port, this vessel had twice been nearly cut out of the harbor, and her preservation was merely owing to a want of wind. From all these circumstances, the court will most probably be inclined to reverse the sentence of the Vice-Admiralty Court, and repair the injury the captors have sustained.

The Nancy. 1 Acton.

JUDGMENT.

SIR W. GRANT. As it appears the commander on that station considered the force employed completely adequate to the service required to be performed, we feel it necessary to rely on his judgment, and condemn the vessel as prize to the captors.

THE ACTRESS, Tinker, THE FREEDOM, Herrick, and ADRIAN, Daleke, all clearing out from Martinique, in the month of February, whose cases were admitted to be within the principle upon which the sentences of the Vice-Admiralty Courts had been affirmed in the foregoing cases, from which they were * not [* 65] distinguishable, were condemned as prize to the captors, for breach of blockade.

Chasing suspicious vessels, in the neighborhood of a blockaded port, no cessation of the blockade.

In the case of THE EAGLE, Marsan, *Adams*, for the claimants, contended, that notwithstanding she had entered the island on the 24th February, there was sufficient proof in the papers exhibited, that the blockade had been periodically interrupted by the prevalence of particular winds and the state of the tides; that several vessels had been permitted to go into the ports of the island under British passes, and several others had entered the island whilst the ships appointed to maintain the blockade had been absent, and employed in chasing vessels of a doubtful description. From these interruptions or relaxations of the blockade, the people of the island were uncertain when they were really invested, and hence he was induced to hope the sentence of condemnation would be reversed, as the master's statement that he was totally ignorant of the existence of the blockade was rendered extremely probable from the circumstances mentioned.

The court confirmed the sentence of the judge below, condemning the vessel.

[* 66]

* MERCURY, Speck, master.

July 6; 1809.

Further proof of property admitted, as to a ship and cargo claimed for a neutral merchant, although both appear to have been purchased in the enemy's colony by his asserted resident agent, without particular instructions to make the purchase, but acting under a general permission given him to originate speculations for account of the neutral merchant.

A QUESTION arose as to the property of the ship and cargo, both of which were claimed for Mr. Juhel, of New York, an American citizen.

His Majesty's Advocate and *Stephen*, for the captors. The circumstances under which this vessel is described to come into the possession of Juhel are of such a nature as to excite in themselves a strong suspicion that he is not really the proprietor. This vessel, during the blockade of Martinique, lay in the harbor of Fort Royal, and was purchased by a Mr. Cock, who assumes the character of commercial agent for Juhel, in New York. This purchase is asserted by Cock to have been made for the sole account of Mr. Juhel, who, in his attestation, admits Cock to have unlimited powers given him to originate speculations on his account; and also states that he has considerable funds in the island, in debts or otherwise, by which, and also by bills of his acceptance, this purchase was made and the vessel laden with colonial produce. A suspicion naturally arises, that this purchase for another's account is merely collusive, and that the scheme has been resorted to in order to give a color to the transaction, and conceal the real owner by this nominal transfer. This is supported by Juhel's silence respecting the purchase of this particular vessel. There is no commission specifically given to Cock, but he proceeds in the whole affair like a person consulting solely his own interest and wishes, lading her with such goods as suit his own purpose, and requiring no sanction from Juhel as to the

[* 67] * asserted purchase of the vessel or lading. In some letters, it is true, he mentions the purchase of both; but it must appear strange that the intimation is not given until the design is already completed. Hence it is fair to infer that he incurred no responsibility to Juhel, or else he would have been more anxious to acquaint him of his intention in time to prevent that responsibility, should the design be disapproved. The whole nature of Juhel's

The Mercury. 1 Acton.

trade to the island tends to show there is a common concern and joint interest with Cock, or others in the island. They both admit unlimited consignments are constantly making, between the one as agent, and the other as merchant. This is in direct violation of the established usage of merchants, and must have its due influence on your lordships' decision. As soon as the blockade was supposed to have ceased, the vessel departed for New York. From this circumstance, and the conduct of Juhel in the case of *The Nancy*, Hurd, it appears his trade to that island was carried on with an intention to defeat the blockade. This must necessarily affect his neutral character, and point out a connection with the enemy. This connection has been happily developed by a paper invoked into this cause from the registrar's office at Halifax, which purports to be a power of attorney from John Juhel and Nicholas de Longuemare, to Messrs. Foresight & Smith, of Halifax, empowering them to receive the proceeds of the ship *Emanuel's* cargo as the joint property of Juhel and Longuemare, and is dated the 9th of March, 1804. This Mr. Longuemare is a Frenchman, and is soon after discovered to be residing in France, probably conducting the concerns of the firm in that country. There has been an attempt made to show that this *connection was broken by a dissolution of partner- [*68] ship, which was notified in *The New York Mercantile Advertiser*, on the 22d of October, 1803. That the connection was not absolutely dissolved is plain, from the date of the power of attorney being much later, namely, March, 1804. There were many reasons, no doubt, to consent to a nominal dissolution of partnership; some, probably, prospective of Longuemare's future residence in France, and others originating in the hope of being able, by this feint, to neutralize the property of the enemy, and defraud our belligerent rights. In the case of *The Nancy*,¹ Hurd, there appears also a claim for property by Mr. Juhel, which it is almost unnecessary to distinguish from the present claim. The same scheme seems to pervade all mercantile transactions in his name. His intentions evidently are to obviate the blockade of the island, and to cover enemy's property by false papers and documents of neutrality. This last intention, it appears, proved fatal to the interest of an admitted neutral, in the case of *The Betsey*, Furlong; and, upon this principle, it may not be too presumptuous to hope your lordships will condemn the property in both *The Mercury* and *Nancy*.

¹ See page 57.

Adams, for the claimants. The nature of the papers produced in this cause will naturally affect the interests of Mr. Juhel in some degree, though by no means to the extent contended for by the captors, unless we are able to explain them to the satisfaction of the court. This the appellants hope will be done most satisfactorily, should there be permission given to introduce further proof. This indulgence they are entitled to expect, from the fair and [*69] explicit nature * of the ship's papers themselves, and the strong and absolute averments of the parties. The power of attorney mentioned will be proved to have reference solely to debts incurred before the dissolution of partnership; and Mr. Longue-mare will also be proved to be this moment residing in London, transacting business on his sole account.

JUDGMENT.

The court ordered further proof to be introduced.

DIOMEDE.¹

July 8, 1809. .

Question as to the general principle of distribution of the flag-eighth in captures asserted to be made conjointly by different flag-officers, either as coöperating personally, constructively, by the ships under their command, or finally, by the capture being made within the limits of their station.

In this case two appeals were prosecuted from the decision of the High Court of Admiralty of Great Britain, which must be considered of uncommon interest, as well from the number of illustrious naval commanders, whose claims were most elaborately and patiently investigated, as from the important nature of the principles of law adopted in the distribution of prize.

The Diomede and Imperial formed part of a squadron of French ships of war, which was defeated and destroyed by a squadron of his Majesty's ships, under the command of Vice-Admiral Sir John Thomas Duckworth, Knight of the Bath, off St. Domingo, in the memorable engagement of the 6th of February, 1806. Proceedings commencing

¹ [For cases as to the flag share, see *The Doloras*, 2 Dod. 413, note.]

in the High Court of Admiralty, of England, touching the adjudication of the *ship Diomede, and a question arising [* 70] as to the distribution of the flag-eighth of the said prizes, the judge (Sir. W. Scott) decided in favor of the following claimants: Vice-Admiral Lord Collingwood, as commander-in-chief in the Mediterranean, (from which station Sir John Thomas Duckworth, in company with Rear-Admiral Louis, had set sail in quest of the enemy, with a part of the fleet under the command of his lordship,) Vice-Admiral Knight, and Rear-Admiral Lord Northesk, the present respondents; and that they, together with Vice-Admiral Sir John T. Duckworth, Rear-Admiral Louis, and rear-admiral the honorable Sir Alexander Forrester Cochrane, were entitled to share in the flag-eighth of the prize; Admirals Knight, Lord Northesk, Duckworth, and Louis, as junior flag-officers under Admiral Lord Collingwood, the commander-in-chief on the Mediterranean station, from whence the armament set sail; and Sir Alexander F. Cochrane, as junior flag-officer on a West India station, taken under the command of Sir J. Duckworth, as his superior officer, and also assisting in the capture. But pronounced against the claim of Vice-Admiral Dacres, within the limits of whose station the capture had been made, and in which capture Admiral Sir J. T. Duckworth had availed himself of the assistance of The Magicienne, one of the ships of war then under the command of the said Admiral Dacres, on the Jamaica station.

Leach, for the respondents, Lords Collingwood, Northesk, and Admiral Knight — There has never been a case submitted to your lordships' decision which equally involved so many considerations of the utmost weight and the most extreme delicacy, both with *respect to the regulation of the respective interests, and the [* 71] due subordination of the different officers of his Majesty's navy, as that which I have now the honor to open on the part of the respondents. As the arguments to be submitted on this part of the case are partly inferential from facts generally admitted, partly founded on the positive and express proclamation of his Majesty,¹ regulating the distribution of prize during the present hostilities, and partly deducible from the custom and usage of our navy for ages, it will first be necessary to take a view of the facts and leading features of the case. On the death of Lord Nelson the command of the Mediterranean fleet fell necessarily upon Lord Collingwood, having, amongst others, Vice-Admiral Knight and Lord Northesk, as junior flag-officers

¹ See Appendix.

under him. On the 19th November, 1805, he issued an order to Sir John Thomas Duckworth, taking him under his command, and another order enjoining him to take under his orders certain ships of the line and other smaller vessels, for the purpose of maintaining the blockade of the ports of Cadiz and San Lucar, in which service he was to regulate himself by the tenor of the instructions he had received in a letter of a former date. From the time of issuing these orders Sir John T. Duckworth continued under his lordship's commands, receiving and obeying his instructions from time to time. Rear-Admiral Louis, whom he succeeded on the station, repaired to the commander-in-chief, in pursuance of orders to that effect; but previous to joining his lordship, he received important intelligence respecting a French force which had appeared in those seas, in consequence of which he conceived it his duty to acquaint Sir

[* 72] *John Duckworth with this intelligence, and returned for that purpose. On the 29th of November Sir John Duckworth wrote to his lordship the following letter:—"Rear-Admiral Louis, who separated from me with The Spencer on the night of the 27th, in execution of your orders, has just joined me again, bringing in The Agamemnon, (which I had placed with The Naiad in shore off Cadiz,) in consequence of the accompanying intelligence he had received from her captain, Sir Edward Berry; and as there is nothing in the port of Cadiz in any state of readiness for sea, except three or four frigates, I shall, in the anxious hope of anticipating your wishes, proceed, as soon as I can get hold of one of the sloops, or The Naiad, to apprise you of my intentions, with a press of sail off the Salvages, and from thence, if not fortunate enough to fall in with the enemy, to return by Vigo to my present situation; and though I could have wished to have had two or three frigates, I will endeavor to do without them." He also, on the 30th November, wrote a letter to William Marsden, Esq., secretary of the admiralty, from which the following is an extract:—"As it is possible a conveyance may be met with from here to England, before Vice-Admiral Collingwood may be apprised of my proceedings, I am to desire you will inform the Lords Commissioners of the Admiralty, that in consequence of orders from that commander-in-chief, received the 26th instant, I detached Rear-Admiral Louis, in The Canopus, with The Spencer on the 27th, to join him, but they returned to me yesterday afternoon with the accompanying intelligence." Lord Collingwood having also received

information of the French squadron mentioned in such intelligence [* 73] * on the 1st of December, 1805, issued the following order to Sir John Thomas Duckworth:—"Whereas I have received information that a squadron of enemy's ships of war are

cruising between the islands of Madeira and Teneriffe, for the purpose of intercepting the convoys and trade going abroad, and that on the 20th ultimo, they fell in with his Majesty's sloop The Lark, and are supposed to have taken some of her convoy, a copy of which intelligence I inclose; you are hereby required and directed to take the ships named herein under your orders, and proceed without loss of time in quest of the enemy's said squadron, off the Salvages, and, on falling in with them, use your best endeavors to take or destroy them. As I think it probable that the island of Teneriffe may be the rendezvous of the above-mentioned squadron, in order to obtain their supplies of water, &c., you will proceed with the ships under your orders, to the southward of the Salvages, between them and Teneriffe, in order to cut off the French squadron from this their supposed rendezvous for obtaining supplies. Having arrived there, and not meeting the enemy's squadron, you are to obtain the best information you may be able respecting them, by vessels boarded or otherwise, and pursue them as long as there is a fair probability of coming up with them; but in case of your not receiving such intelligence as may lead you to the enemy, you are to return with all possible expedition to the rendezvous off Cadiz, where, making up the number of six ships of the line, two frigates, and two sloops, you are to continue the blockade of that port, agreeably to my former orders of date the 28th ultimo, sending Rear-Admiral Louis with the remainder to Gibraltar Bay, to *complete their water and provisions, [* 74] which being done, they are to join me on the rendezvous they will receive from Rear-Admiral Knight. You are to transmit me a journal of your proceedings, by the same conveyance, or sooner if opportunity offers." This order was sent by his Majesty's ship Tigre, but that ship not meeting with Sir John Thomas Duckworth at the rendezvous appointed, the same was not received by him. On the 14th January, 1806, Sir John Thomas Duckworth, being then at Barbadoes, wrote and sent a letter to Lord Collingwood, from which the following is an extract:—"In consequence of a proposal made to release some prisoners, I left The Acasta, which had joined me that morning, to receive them; but alas, this great civility of the governor produced only two old men, one a Swede. Thus I was disappointed in my expectations; but I derive great pleasure from your lordship's kind letter, and what Captain Dunn acquainted me, as it convinced me the step I had taken, in going in pursuit of the enemy, had met with your approbation; and as it was evident that they had stood to the N. E., I made sail for the Salvages, for the purpose of joining The Neptune, Tigre, and frigates your lordship mentioned having detached; but the wind being now unfortunately

The Diomedé. 1 Acton.

very fresh from the northward, I did not get past for five days, in which time I saw none of the ships alluded to, and, consequently, made use of all my endeavors to return by Cape Finisterre." On the 3d of February following, Sir John Thomas Duckworth, being off the island of St. Thomas, again sent a letter to Lord Collingwood, in which he states, that "finding by the accounts from thence,

[* 75] as also the various parts of the command, that the *account of the force alluded to, brought by The Pheasant, had neither been seen nor heard of, I determined on leaving St. Christopher's this day, to return to my station under your lordship, when, on the first instant, I received the interesting intelligence herewith transmitted, and from the character of the party from whom it came, Rear-Admiral Cochran, gave it full credit for authenticity; and in consequence, I directly weighed with the squadron that I left Cadiz with, except The Powerful, which, I already mentioned, I had detached for India, also increased by The Northumberland and Atlas; and though I was by no means disposed to remove Rear-Admiral Cochrane from his command, the delay that must have been produced before a frigate could be sent for to take him on board, and his strong objections to the removal, induced me to take him with me; yet, from the particularity of the intelligence, with the names of the ships, &c., great doubts are raised in my mind at the French being so communicative, though, as time, and other parts of it, correspond with information before received, I feel nothing could justify my leaving the country in that state of doubt, especially as the Lords Commissioners of the Admiralty are aware of your lordship's reduction of force by my being in these seas." On the 6th of February, Sir John Thomas Duckworth fell in with the squadron of French ships of which he had gone in pursuit, as stated in the letters and orders before recited, off the island of St. Domingo, and, after a severe action, captured and destroyed five line of battle ships, of which the ships mentioned in the proceedings were two. On the 7th of February, the day after the

[* 76] action, Sir John Thomas Duckworth sent *a letter to William Marsden, Esq., giving an account thereof, beginning thus: "As I feel it highly momentous for his Majesty's service that the Lords Commissioners of the Admiralty should have the earliest information of the squadron under my command, and as I have no other vessel than The King's Fisher that I feel justified in despatching, I hope neither their lordship's, nor Vice-Admiral Lord Collingwood, will deem me defective in my duty towards his lordship, by addressing you on the happy event of yesterday." And on the same day he also sent a letter to Lord Collingwood, as his commander-in-chief, giving him likewise an account of the action; and also, on the

next day, another letter to Lord Collingwood, as follows: "Inclosed herewith I have the honor of transmitting, for your lordship's information, a list of the killed and wounded, with intelligence since drawn from the French prisoners; and I am this moment sending to set fire to L'Imperial and Diomedé, when the business will be complete, on which I most heartily congratulate your lordship." On the 19th of April following, William Marsden, Esq., wrote and sent the following letter to Lord Collingwood, namely: "I have the commands of my Lords Commissioners of the Admiralty, to signify their directions to your lordship, to give Vice-Admiral Sir John Duckworth leave to return home, in such ship as your lordship may have intended to send to England, on account of her want of repair, provided the vice-admiral should wish to avail himself of this permission." On the 30th of April, Sir John Thomas Duckworth, in his Majesty's ship *Superb*, and in company with his Majesty's ship *Acasta*, from the West Indies, rejoined * the fleet under the command of Lord [* 77] Collingwood, and thereupon delivered to Lord Collingwood, as his commander-in-chief, a journal of his proceedings during his absence. The following is an extract of an entry therein on the 30th April: "At ten, joined the squadron under Vice-Admiral Lord Collingwood, the commander-in-chief."

On a review, therefore, of the facts, it must be evident, that during the enterprise, and even at the time when he rejoined the fleet, there was not a doubt on his mind that he acted under the orders and subject to the command of his chief, Lord Collingwood. That this was also the opinion of his lordship, may be easily inferred, as well from the communications made by him to Sir John Duckworth, wherein he uniformly mentions this enterprise as growing out of the particular service to which he had been appointed by his command, as from the manner in which he was received by him on his return to the fleet. No expostulation takes place, no objection is made to his conduct, nor any intimation given by his commander that he had exceeded his orders. He delivers to his lordship a journal of his proceedings, and the conduct of both the one and the other most clearly demonstrates, that they entertain the fullest conviction that this enterprise had been begun and conducted throughout under a mutual responsibility for its failure or success, on the part of the vice-admiral to the commander-in-chief, and on his part to the board of admiralty and the country. This, however, does not rest solely on their mutual conviction, it is most distinctly proved by their mutual acts. His lordship appoints the vice-admiral to the station, furnishes [* 78] him with instructions, and also points out to him the necessity there exists, on such a service, to exercise a due discretion in all

instances which may not be provided for by the letter of his instructions. This, no doubt, was to extend, in the first instance, to all accidental occurrences which might be supposed to have a reference to, or an effect upon, the service in which he was then peculiarly engaged, and in a more extended sense may be supposed to embrace all possible cases wherein, without detriment to the particular service to which he had been appointed, the general interest of this country might be promoted, or the designs of the enemy frustrated. That such was the acceptance Sir John Duckworth gave to this permission of a general discretion, is evident from the precaution he took in examining and ascertaining what proportion of the enemy's force was at that time in a state of preparation for sea. This, he found only consisted of a few frigates, and justly concluding these frigates would not venture out without the support of some vessels of the line, he took this opportunity of pursuing the enemy's squadron, in consequence of the advice he received from Admiral Louis, who, it should be observed, was then acting as an inferior officer under the command of his lordship. Thus, even in this first stage of the undertaking, he appears acting in consequence of advice received from an officer under the orders of the commander-in-chief; but it is almost equally certain, that had he received this information from any other source, his conduct would have been precisely the same. To prevent the escape of the enemy's fleet to that portion of the globe where it might most materially injure our interests, was an obligation paramount

[* 79] to all others. Aware, therefore, * of the extreme importance of intercepting them, he commences the pursuit, even under disadvantageous circumstances, and, eager to relieve the anxiety of his commander and the board of admiralty, occasioned by this escape of the enemy's fleet out of port, he despatches letters, acquainting both of his having set out in pursuit. His lordship, previous to the receipt of the letter, becomes acquainted with the escape of the French fleet, and issues orders to Sir John Duckworth to proceed off the Salvages, in pursuit, and to continue it so long as there might be any probability of overtaking them, in which, should he fail, he is ordered to return to his original station. This order did not reach him, in consequence of his having anticipated the wishes of his lordship, acting in conformity with that discretionary power, the exercise of which had been sanctioned by his commander's orders, expressly and uniformly maintained by the custom and usage of all naval officers from time immemorial. In the exercise of this discretion he arrives, after pursuing the enemy's fleet for a considerable time, in the island of Barbadoes, from whence he acknowledges the receipt of a letter from his lordship, acquaints him with the reason of his continuing the pur-

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suit to the West Indies, with other particulars of his voyage, as is usual in similar cases of despatches from an inferior flag-officer to his superior. In the same manner he writes from the island of St. Thomas, acquainting his lordship with the existence of an enemy's squadron in those seas, in pursuit of which he felt it his duty immediately to proceed, taking with him Sir Alexander Cochrane, and the vessels under his command. In this letter, he explicitly avows his conviction, that nothing could justify *his leaving these [* 80] islands exposed to the attacks of a force far superior to any the British commanders in those seas could collect. After the engagement, he acquaints both his commander-in-chief and the Lords Commissioners of the Admiralty with the agreeable result, and shortly after transmits to his lordship an account of the killed and wounded, with other particulars of the engagement. It may, perhaps, be contended, that in acquainting the admiralty first with his intentions, and finally with his success, he acted under a consciousness that he had already exceeded his instructions, by deserting the blockade, and that the whole responsibility of the transaction would necessarily fall upon himself alone, having, as it were, taken himself from under the command of Lord Collingwood, by disobedience of his orders. This is not discoverable from any expressions either on the part of Sir John Duckworth or his lordship; the anxiety of both for the issue of the contest, proves the reverse; and this anxiety, which he presumed equally affected the Lords of the Admiralty, was alone a sufficient inducement with him to make them acquainted as soon as possible with the line of conduct he proposed to adopt. The usual way certainly was to acquaint the commander on the station, who communicated the intelligence to their lordships. Here there, however, existed various cogent reasons to communicate directly with the admiralty. In leaving the blockade, he was anxious, as he states in his letter to Lord Collingwood, to acquaint them of the circumstance as soon as possible, that they might send out a force to recommence the blockade, if it should be considered necessary. In acquainting them with the victory, he sought to relieve their minds of an anxiety which was not *confined to them alone, but had pervaded all ranks of people in this country. His object, in both instances, was to prevent inconvenience to the service, and anxiety to the nation, but by no means to cover or shield himself from the probable consequence of a breach of orders; and it could not, therefore, be fairly inferred from hence, that he acted under a conviction he was solely accountable for the success or failure of this voluntary pursuit, to their lordships, and to the country at large.

Having said so much on the facts of the case, as well as the gene-

ral usage of the service, I shall next refer your lordships to the express letter of law on the subject, which is most explicitly laid down in the proclamation of his Majesty, regulating the distribution of prizes during the present hostilities, and dated the 7th of July, 1803. The preamble, if it may be so called, of that part regulating the distribution of the flag-eighth, provides, that those flag-officers alone shall be entitled to share in the prize who have actually been on board at the time of capture, or have been directing or assisting therein. This general provision, connected with the seventh article of these regulations, includes the whole of the argument upon which the respondent's case is expected to be supported. The seventh article ordains, that an inferior flag-officer quitting a station, (except when detached by orders from his commander-in-chief out of the limits thereof upon a special service, with orders to return to such station as soon as such service is performed,) shall have no share in prizes taken by the ships and vessels remaining on the station after he shall have passed the limits

thereof; and in like manner the flag-officers remaining on [* 82] the station shall have no share of the * prizes taken by such inferior flag-officer; or by the ships and vessels under his immediate command, after he shall have quitted the limits of the station, except when detached as aforesaid. Upon this article the claim of the respondents must rest, and upon that particular part of it which states the exception to the general principle laid down in the body of the article. It is not intended to deny, that had he quitted the station without orders expressed or implied, he would then have subjected himself to censure, and, perhaps, have thereby excluded his chief, whose authority he had thrown off, from participating in any prizes made; but the right of participating is intended to be maintained by the fact of his having quitted the station consistently with, and in strict conformity to, the general orders he had received on being appointed to the station; and on the commander-in-chief's having issued particular orders, to draw off his force from the blockade, and proceed to chase the enemy, which orders he would have received, had he not already acted upon that discretion vested in him by virtue of his appointment to the command of that important station. Here, then, it is perceivable, that Sir John Duckworth's conduct is not only in conformity with the general orders he had received, granting him a discretionary power, but also in strict conformity to the particular orders which it had very naturally been expected would have been issued on the occasion, and had, therefore, been anticipated with so much subsequent advantage to the country. The article alluded to, is in itself sufficient to maintain the right contended for, were it not supported and corroborated by the fundamental principle upon

which the distribution of the flag-eighth is founded in the commencement of *this part of the proclamation, limiting [* 83] the distribution solely to the flag or flag-officers who shall actually be on board at the capture, or directing or assisting therein. Sir John Duckworth and Sir Alexander Cochrane are admitted to share on the first principle recognized. The terms directing or assisting therein, are necessarily inferred to include the commander-in-chief on that station from whence Sir John Duckworth proceeded. These terms are not meant to imply that in all engagements fought, or captures made, on a station, that the commander-in-chief of that station shall arrange the disposition of the forces employed in the affair, nor even that he should be at all acquainted with the state of the combatants or captors, further than the usual naval returns at stated periods might afford him general information. It is sufficient that he has once taken the respective squadrons on the various requisite services under his command by general orders, to infer, that from the moment of his issuing those orders he is constructively, not actually, aiding and assisting in all those enterprises, combats, or captures, which may be made by the forces under his command. This constructive assistance is also considered to be extended to all such flag-officer or others, as he may feel it his duty to despatch out of the station upon any requisite service. Upon this interpretation of the proclamation mentioned, and the known usage of his Majesty's navy, the claim of his lordship to the flag-eighth is founded. His claim being once established, there can be no doubt that the remaining respondents, Vice-Admiral Knight and Earl Northesk, inferior flag-officers on that station, are equally entitled to share in their respective *proportions. Sir Alexander Cochrane can only [* 84] be entitled to share as a junior flag-officer under Sir John Duckworth and Lord Collingwood, having been taken under the command of Sir J. Duckworth during the voyage; and Vice-Admiral Dacres, within whose station the capture was made, is excluded from any share whatever therein, inasmuch as he was not present at the time of the capture; and The Magicienne, though originally a part of his squadron, had been assumed by Sir John Duckworth, as his superior officer, and actually formed a part of his squadron at the moment of the engagement. From these weighty considerations, which have already proved successful in the High Court of Admiralty, the respondents confidently hope your decision will confirm the sentence of the court below.

Arnold, also for the respondents. In addition to the arguments already urged in support of the decree of the High Court of Admiralty,

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it is my duty to draw your lordship's attention to the distinctions made both by the usage of the service and the proclamation mentioned, in favor of the superior officers of the navy, in cases of joint capture. The inferior officers are absolutely required to be personally aiding and assisting at the time of capture, to entitle them to any share in the prizes made; the superior officer is solely required to be generally aiding and assisting. This may mean either personal or constructive assistance: the last forms the leading feature of the respondent's case. The latitude given in this sense to the terms aiding and assisting, is very extensive. To imply constructive assistance, it is not necessary that the flag-officer should be actually present or near at the time; that the inferior officer should be provided with express orders as to the particular service in which he was employed when the capture was made, or that the capture should even be made within the limits of his station. No: it is sufficient that the superior flag-officer should have taken the inferior under his orders generally, and that under these general orders he should continue to act during the time in which the capture was made. Thus, all possible enterprises arising out of, or consistent with, the general service to which the inferior officer had been appointed, still are included within the general principle of constructive assistance. There are but two modes recognized by which it is possible an officer can quit his station; one by orders from his superior or the admiralty, another by quitting his station in direct violation of orders, or, as it is termed, in delinquency. Had Sir John Duckworth abandoned his station in delinquency, it would have been the imperative duty of Lord Collingwood, whatever might have been the result, to have made a representation of his misconduct to the Lords of the Admiralty, and an investigation of his conduct must have taken place. This has not occurred; the inference, therefore, is, that the enterprise in which Sir John Duckworth engaged, was consistent with, and sanctioned by, the general instructions he had received. No orders appear to have been issued by the Lords of the Admiralty, in which case the eighth article of the proclamation would have been sufficient to defeat the claim of the respondents in the court below, which expressly provides against any such participation of prize captured. It must, therefore, follow as a consequence, that Sir John Duckworth's enterprise can solely be concluded to have been commenced and continued under the orders issued by Lord Collingwood at the time of his appointments to the Mediterranean station. The principle upon which his lordship's claim as joint captor is founded, arises from the responsibility to which the superior officer is subject for the exertions and conduct of those under his command, as applicable to him in

common with all superior officers, and is recognized in almost every one of the several articles of that part of the proclamation relating to the distribution of the prize flag-eighth. Thus, on a flag-officer's arriving on a station to supersede another, he immediately derives, under the third article, a right to all prizes taken by the squadron to which he has been appointed, as soon as he arrives within the limits of the station. This may be considered a more remarkable instance of the extension of the principle of constructive assistance; the only claim he can have to share being derived from the assistance or direction given by his predecessor in command, but which, constructively, is attributed to him in order to entitle him to his due proportion of the flag-eighth. This principle, so clearly demonstrated, comprises the whole case of Lord Collingwood. Sir John Duckworth considers himself solely accountable to his lordship for his conduct, and therefore informs him of his intentions, apologizing at the same time for irregularly acquainting the Lords of the Admiralty by a more direct communication. These intentions were sanctioned by his lordship's acquiescence, (if, indeed, they had needed any,) even upon the principle of his lordship's general orders to the vice-admiral; and this approval on the part of his lordship, of an act done without his immediate orders, *may be considered tantamount to [* 87] such orders. Nor can it materially alter the case, should it be objected, that the vessels concerning which his lordship issued those orders actually escaped Sir John Duckworth's pursuit, and those which were afterwards captured belonged to another squadron. The principle is the same, namely, that the vice-admiral was borne out in this exercise of a due discretion by the general orders issued, which equally included the second squadron as the first, and that in each and every part of the enterprise the commander-in-chief was constructively and impliedly directing and assisting in the capture; neither can it be doubted, that had there been any failure in this enterprise, his lordship would have incurred a heavy responsibility to his country for not having at any time signified his dissatisfaction with the undertaking, or exerting the power vested in him by recalling him to the station, which the frequent means he possessed of communication with Sir John Duckworth would have enabled him repeatedly to have done with effect.

Addams, for Vice-Admiral Dacres. The principal difficulty in the examination of the merits of this case arises from the high authority of the judge who has already decided in favor of the respondents. Every possible deference should be, and undoubtedly is now, paid to the decisions which have been of late years made in the High Court of Admiralty. Yet in this court it cannot be considered in the least

disrespectful to that authority, to suggest the necessity of excluding any other considerations than the naked facts of the case, the known law on the subject, in conjunction with the general principle [*88] of equity, upon which a case * is usually decided on its introduction to your lordship's bar from any of the numerous other courts within your extensive jurisdiction. It will be altogether unnecessary in this instance to direct your lordship's attention to any number of topics in support of the claim of Admiral Dacres. The legal principle which must decide upon his claim may be wrought out from a document plainly written and simply worded, throughout which it is impossible not to perceive there is but one spirit uniformly actuating and influencing each provision. This proclamation, which has already been quoted repeatedly, contains in the seventh clause, relative to the distribution of the flag-eighth, the just and rational principle which alone can fairly be applicable to the question at issue, and which, as it was considered to contain matter of the last importance and the most extreme delicacy in ascertaining the reciprocal rights of the inferior and superior flag-officers of his Majesty's navy, seems to have been so explicitly worded, that no possible cavil can be raised as to the meaning and intention of this part of the proclamation. This article contains a general rule, with an exception, upon which it has been attempted to prove the respondents are entitled to claim. To support such an assertion recourse is had to every thing but the plain letter of the proclamation. The words, "leaving a station," may be extremely easily understood, without referring to any supposed custom or practice of the service, which, even taking it to be such as it is contended, seems by no means to be uniform in its operation or perfectly ascertained. The whole of the judgment of Sir W. Scott, in the case of *St. Anne*,¹ (though deciding in favor of the admiral's claim when absent from [*89] * the station, from which, however, he had only departed *pro tempore*, reserving to himself the power of returning when his health should be reëstablished,) displays a strong disinclination to associate with the plain words of the admiral's instructions to his successor, any of the usual motives, customs, or rules of the service, which could not possibly have any thing to do with them. Our case also rests upon the plain meaning of an admitted document:—we are content that the words, "quitting a station," should be taken according to their obvious meaning; the respondents require that they should be taken in the more complex sense of "quitting with orders." Hence they contend they are entitled to share within the exception mentioned, reserving to the

¹ C. Robinson's Reports, vol. iii. p. 70.

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superior officer a right to share when the inferior flag-officer is detached by orders, with injunctions to return after having performed such and such services pointed out. To contend for this construction, making this departure a departure by orders, is drawing into the case matter *aliunde*, and is by no means justifiable in this instance. If it be inferred from the decision of the judge of the High Court of Admiralty, that he was of opinion quitting is quitting with orders, this opinion is in direct opposition to that of Lord Ellenborough in a similar case. Whilst they constructively uphold the doctrine that Sir John Duckworth could not quit without orders, we prove from facts that he did quit without any. Had he quitted his station without orders, they contended it would have been a desertion; this inference we also admit with them to be fair. There can be no doubt it was a desertion until approved, and such, it must be inferred, Sir John Duckworth thought it from the extreme anxiety he *displayed to obtain some notification of his lordship's [*90] approbation of this enterprise, and the apologies he so constantly makes for his conduct. Admitting, however, it was a desertion, it cannot be inferred from hence that the respondents would derive any right to the prizes taken from this circumstance, since Lord Collingwood can only derive as commanding Sir John Duckworth. Nor will the court permit the subsequent approval of the enterprise to make so material a change in the respective civil rights of the parties, as to give this approval, on the part of an interested person, the force of an investment of a right to a material benefit. The next consequence of such an admission would be, that the commander-in-chief was subject not to an actual but an optional responsibility, having it in his power to reserve his approbation of the enterprise undertaken until time should enable him to ascertain whether it would be consistent with his interest to assume, by such an approval, this responsibility. The correspondence, upon which so much has been said, can be but of very little weight in leading your lordships to a decision on this point. The letters only substantiate Sir John Duckworth's natural unwillingness to remove without orders from his station, and although he had conceived he was acting under the orders of his chief, it does not follow, *ex consequentia*, that he really was so. His opinion would not overturn the fact. But it does not appear that he thought so; for he is discovered providing against the possible consequences of his quitting without orders, by writing to the admiralty on going out upon the enterprise, and also after the capture. This proceeding *per saltum* is totally contrary to the custom of the navy, and must, therefore, be supposed to be founded *in very serious reasons, probably the appre- [*91]

hensions of the vice-admiral that his conduct might not receive the sanction of the commander-in-chief. His anxiety, therefore, to obtain the sanction of their lordships induces him to communicate with them, and even to communicate to them the hopes he entertained, and the plan upon which he intended to proceed in future, expressly stating, that he will ultimately be guided by events. If it be admitted that he was *primâ facie* a deserter from his appointed station, he could not be relieved by the approbation of Lord Collingwood, but by the determination of a court-martial. His letters to his commander and their lordships show, no doubt, an anxiety for his and their good opinion, and takes place of the *primâ facie* delinquency. But can it be admitted that it is competent for his lordship thus to make, by his tacit subsequent approval, a defeasance of the offence, and an absolute accruing of a right to share in the captures? A case strongly in point is found in the sixth volume of East Reports, page 220, *Harvey v. Cooke*. Captain Milne, under orders issued by Admiral Harvey, was directed to lie off Demarara for the specific purpose of intercepting the trade of the enemy. He soon after sailed to St. Kitts, and being anxiously solicited by the merchants in that colony to convoy the British vessels then ready for Europe, and in danger of losing the favorable opportunities of wind and season which then prevailed, he, without any orders from his superior, undertook the task of convoying the trade vessels to England. On his passage he came up with and captured a vessel belonging to the enemy. A question arose whether the admiral, under these circumstances, could be entitled as directing and assisting in this

[*92] capture. *It was argued, that Captain Milne, having acquainted the admiral with his intentions, and solicited his approbation, which, though not given, was not, however, refused, (Captain Milne having received no answer whatever to this communication,) the admiral's right to share must be admitted. For the defendants it was contended, that the orders which Captain Milne had received from the predecessor of Admiral Harvey in command, had been violated, and the voyage, appearing a matter of urgent necessity, undertaken upon his own responsibility alone; of which he was so perfectly conscious, that on his arrival with the convoy in England, he made immediate application to the Lords of the Admiralty, and obtained from them a sanction for the line of conduct he had pursued. This case, with the opinions delivered upon it by the several learned judges, is decidedly in favor of my argument. It cannot be doubted that flag-officers have a latitude of discretion, as well as greater privileges respecting that coöperation which they must afford to entitle them to share, than commanders of vessels.

But will it, therefore, be contended, that they have also a right to a more extended latitude of discretionary disobedience? Certainly not. An analogy has been attempted to be instituted between the present case and the capture of prizes in the neighborhood of a blockaded port by a blockading squadron. Such captures are frequently made in direct conformity to the instructions for a blockade, and may be generally considered part of the service itself. It is nothing less than a *petitio principii* to argue that the enterprise is included within the exception of the seventh article, and that the quitting in the present instance is equivalent to a detachment by orders. And hence the principle *of Lord Ellenborough's decision should be particularly [*93] attended to, who, in his judgment in the case cited, strongly insists on the necessity there is to adhere to the letter of the proclamation itself, the terms of which contain no ambiguity. It is even urged there were orders issued by his lordship for this undertaking. Those orders, it should be carefully distinguished, pointed to another fleet of the enemy, which outsailed Sir John Duckworth's squadron. The sanction contended for ceases with this pursuit, to which alone the orders specifically pointed, and for which purpose The Acasta and other vessels had been detached to reinforce him; admitting, then, the imputed sanction as contended, Sir John Duckworth should, in compliance with the terms of this sanction, have immediately returned to his station. No argument can be drawn from his lordship's not having controlled this departure, because it appears plainly he had it not in his power to exercise this control. Where was his lordship to find this officer, who, in the exercise of a presumed discretion, had gone in pursuit first of one squadron, and afterwards of another, whose destinations were unknown to either his lordship or the vice-admiral himself. In order to maintain Lord Collingwood's title, recourse is now had to improbable hypothesis, and strained metaphysical constructions, which cannot for a moment be supposed applicable to the provisions of a proclamation intended to regulate the interests of plain men, totally unacquainted with legal artifice and logical subtilty. It is not intended to controvert the opinion, that the assistance of a superior flag-officer, constituting a fair claim to prize, rather implies general directions and prospective counsel, admitting also a considerable degree of *discretion [*94] to the inferiors in command. The directing and assisting mentioned in the proclamation as entitling him to share, extend, probably, in their constructive sense, solely to acts done within his station; but positive and express directions must be proved to have been given respecting any enterprise undertaken out of the limits of his

station, as no inferior officer would be desirous of incurring a fresh responsibility without a perfect understanding with his superior, were there not, as in the present instance, a most urgent necessity existing for incurring this new responsibility, and running the hazard of future displeasure. On the nature of the third and fifth articles, it is only necessary to point out, that any discretion permitted to inferior flag-officers therein, merely refers to the limits of the station, and cannot, by any species of argument, be brought to bear upon the present question. The injury which the actual captors will sustain should the sentence appealed from be confirmed, is not confined solely to the proportion of the prize claimed for the commander-in-chief. This metaphysical inference includes also two other inferior officers as proportionate claimants on the flag-eighth. As it has been hitherto the uniform rule of the Prize Court, to exclude the matter of naval discipline, and confine its decision to the civil interests of the parties, it will no doubt be considered by your lordships expedient to act in this respect as the Lords of the Admiralty have already done, who have not concluded this enterprise, although undertaken without orders, a desertion, but proceed to deduce the respective civil interests of each from the fair and simple words of the proclamation.

To whatever may have fallen in argument from the opposite side, with respect to an increased responsibility upon the part of his lordship by his sufferance of the undertaking, it is only necessary to answer, that as Sir John Duckworth had exceeded his instructions, and departed from his station, the responsibility on his part was increased, whilst, on the part of his lordship, it was almost, if not altogether, suspended. Amongst other strange inferences to be drawn, as consequences of admitting the claim of Lord Collingwood to share in this instance, his lordship must be equally entitled to share in whatever prizes may have been made by The Powerful and Amethyst in their respective voyages to Great Britain and India, though then on the Mediterranean station, whilst reciprocally Sir John Duckworth must be considered entitled to share in the flag-eighth of all such prizes as may have been made by the Mediterranean fleet during his absence in the West Indies. These consequences, however extraordinary or absurd, naturally flow from the doctrine contended for by the respondents, and must stand or fall with it. The claim of Vice-Admiral Dacres is founded on the circumstances of the capture having been made within the limits of his station, as has been admitted; and that The Magicienne, which had constituted a part of the squadron under his command, must be supposed to have been by his directions and management put in the way of Sir John Duckworth, so as to be present and assisting in the

capture. Vice-Admiral Dacres must be considered constructively on board his own ship, within his own station, directing and assisting at that time, and this without any forced rule of construction whatever, but in strict conformity with the plain meaning of the proclamation. Hence he derives a right as inferior flag-officer under his superior, Sir John Duckworth, *whose claim, could any con- [* 96] siderations of equity interfere, would be no less supported by the distinguished courage and superior conduct he evinced throughout the whole transaction, than by the plain words and explicit intention of his Majesty's proclamation.

Stephen, for Sir John Duckworth and Vice-Admiral Dacres, jointly — Should the sentence of the High Court of Admiralty be confirmed, and Lord Collingwood be included in those entitled to share in the flag-eighth, the loss to all those actually engaged in the capture, and particularly to Sir John Duckworth, will be extreme, his share under these circumstances will be reduced to about 1,200*l*., whilst Lord Collingwood will derive nearly 6,000*l*. from an enterprise begun, continued, and ended without his previous command or concurrence. Admiral Dacres will be totally excluded from any share whatever, whilst Sir Alexander Cochrane and Admiral Louis are placed upon an equal footing with the inferior flag-officers of the fleet in the Mediterranean. This distribution evidently seems to violate the intention of the legislature, so far as it is to be collected from the terms of the Prize Act, which solely admits the claim of those denominated "takers or captors." This intention is further demonstrated and supported by the express terms of the proclamation, which only provides for the interest of those actually present or directing and assisting in the capture. In order to give a feasible coloring to this pointed violation of the known law regulating prize distribution, your lordships are requested to increase the constructive effect of these unambiguous terms beyond that given to them in other courts. Inferior flag-officers, whilst following any scheme that may *accidentally grow out of the original design or service to [* 97] which they were appointed, and which original intention may be thus totally defeated by their departure from orders, are yet to be considered acting under an implied sanction of their chief. But this construction is not consistent with sound policy or our maritime interest, since its consequences must evidently tend to frustrate the intentions of the admiralty to support any combined and consistent system of warfare. The principle contended for appears in all its grossness and impolicy in the present instance, for here it is held, that however wide, and however many these successive departures from

the general orders given to the officer on his appointment may be, yet still he must be considered as acting under the orders and sanction of his chief. What will the supporters of this principle think of the many acts of indemnity which have been passed by the legislature, in order to exonerate from penalty parties which have exceeded the excellent general regulations adopted in the service, when upon this principle it would have been sufficient for them to have had recourse to the construction contended for to justify such conduct. Against such a principle of construction the decision in the case of *Harvey and Cooke*, already quoted, is decidedly adverse, as well as that in *The Orion*,¹ in the High Court of Admiralty, where a claim had been set up by Admiral Kingsmill, on the Irish station, for the flag-eighth in prizes taken by Sir Thomas Williams, captain of his Majesty's ship *Unicorn*, on a cruise in the chops of the Channel. This vessel had been detached by orders from the fleet on the Irish station to refit, with an injunction to return as soon as possible.

When ready for sea, Sir Thomas Williams received orders [* 98] * from the admiralty to take a short range in the chops of the

Channel, for protecting or convoying the homeward bound trade, and after such cruise to rejoin Admiral Kingsmill. On this cruise the prize was taken; a claim to the flag-eighth was instituted on the part of the admiral, which Sir W. Scott rejected, conceiving, that in consequence of these orders of the admiralty Sir Thomas Williams was no longer under the immediate direction of the admiral, who, therefore, could not be considered directing and assisting in this capture. The judge even anticipates the query which has been put in arguing the present case, and adds, that "had Sir Thomas Williams taken upon himself this cruise on his own responsibility, it would be difficult for the admiral to build a claim to the flag-eighth on a capture so made."

It is peculiarly necessary, for the interest of the service, to guard against the indelicacy of confounding the motives which may actuate a superior flag-officer as the commander of a squadron, respecting any officer under his command, with those which may influence him as claimant of a property in litigation between them. When, from the nature of his official situation, a superior officer may feel it his duty to bring an inferior to trial upon a charge like the present, of quitting his station without orders, which might perhaps affect his life, the accused may be induced to suppose that resentment in the breast of his commander, for the loss of his share in the prizes taken

¹ Robinson's Reports, vol. iv. p. 362.

in consequence of this disobedience, may have been no small part of the commander's motive in instituting the prosecution. To prevent any such misinterpretation or jealousy of the superior's motives, and leave no doubt on the minds of naval officers respecting their mutual *interests, the proclamation has been most cri- [* 99] tically accurate and explicit in pointing out all the possible relations in which flag and other officers may stand to each other, as well as the proportions in which they shall be entitled to share.

Amongst the endeavors made to show that the commander-in-chief sanctioned this enterprise, your lordships' attention has been directed to a private and unofficial letter sent by his lordship to Sir John Duckworth. This letter, however, refers solely to the fleet supposed to be cruising near Madeira, in pursuit of which he directs him to proceed, and acquaints him with the circumstance of his having detached a reinforcement to him for that purpose. No approbation can be supposed to be contained in this letter of any enterprise but that pointed to in the official letter, which, however, was not received.

Under these circumstances, the question now before your lordships is solely whether, as there were no orders given for this undertaking by the commander-in-chief, his subsequent approval, after its fortunate issue, can possibly affect the interests of all these different officers, who are the appellants in this cause. Hitherto the right of parties supposed to be concerned in a capture is vested solely by the capture itself, and has never been affected by *post facto* occurrences. Meritorious service, or incurred responsibility, have alone been the foundation of the claim of superior officers. To the first, the respondents can have no pretension in this instance; and it may very reasonably be asked, what responsibility could they have incurred had this enterprise, of whose existence they were not even previously apprised, failed? As his lordship possessed no power of controlling Sir *John Duckworth, all responsibility ceased [* 100] as soon as he had departed from the positive orders issued.

On the principle of the fourth article of the proclamation, which provides that no flag-officer passing through a station shall be entitled to share in any prizes taken in that station, by vessels under another flag or admiralty orders, except he shall be appointed to the command of that station by the orders of the Lords Commissioners of the Admiralty, the claim of Admiral Dacres is founded; since inasmuch as Sir John Duckworth could not, agreeably to this order, be entitled to any share in a prize made exclusively by The Magicienne, as being one of Admiral Dacres' squadron, Admiral Dacres must still be supposed to be on board this vessel, though coöperating with

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the fleet of another flag; and must, therefore, be included within the number of officers entitled to share, as directing and assisting in the capture.

The *King's Advocate*, for Sir Alexander Cochrane. By the decree now appealed from, Sir Alexander Cochrane, an active, distinguished officer in this enterprise, finds his interests absorbed, in a great measure, by a man nearly five thousand miles distant, and this through the medium of an inferior officer who has passed into his station, without any commission or appointment for that purpose from the Lords Commissioners, or his commander-in-chief on the station he abandoned. He finds himself thus associated in this enterprise directly to his disadvantage, whilst nothing beneficial, either directly or indirectly, can possibly accrue to him from a junction with this force, in preference to any other. Had he been associated [* 101] with any other flag, which was independent of another superior flag, his risk would have been no greater in the combat, whilst his share of the prize must have been vastly more considerable. Upon this subject too little has been said in the court below, when it is considered how extreme is that grievance of which he complains. If it appear his lordship cannot fairly maintain a claim against Sir John Duckworth, neither can such a claim affect the interest of Sir Alexander Cochrane. Upon this part of the case no doubt can be entertained. But should it be admitted, for the sake of argument, that his lordship had a fair claim to a share of prizes taken by his detached flag-officer, it cannot be inferred that he must have a derivative claim to share with Sir Alexander Cochrane, from the circumstance of his acting under this detached officer. For as by the eighth article of the proclamation captains of vessels, under different flags, making a joint capture, are required to pay to their respective flag-officers one third part of their share of the prize so taken; upon the same principle, no possible claim of any other officer can affect the share of Sir Alexander Cochrane, who must derive an immediate right to that proportion of the flag-eighth, which all admit he would be entitled to claim had he and Sir John Duckworth alone shared the prize. This must be the natural inference, from the circumstance of his being on a station altogether independent of his lordship, and having no communication either directly or indirectly with him. In conformity with the general principle which has been laid down, Lords Nelson and Bridport, in a case of joint capture by four frigates, two belonging to the Mediterranean and two to another station, derived each their respective flag-eighth from the captain's share of those frigates severally belong-

ing to their *particular stations. This principle is sup- [*102] ported by the whole tenor of prize regulations. The amendment of the Prize Act restrains the interest the commander-in-chief or flag-officers may have in prizes taken, to the time of his arrival on the station; and the tenth article of the proclamation, in pursuance of this principle, provides, in the case of many flag-officers claiming as joint captors, that the prize shall be distributed solely to those serving together at the time of capture.

SIR W. GRANT. It appears, from the manner of distributing a privileged share to the superior flag-officer, when more than one are engaged together, that, under the tenth article, an inferior officer, although coöperating with a greater number of ships than his superior, may derive a share of prize considerably less than him.

It would, perhaps, be more just that each flag-officer's share should be regulated by the number of ships acting under his command at the capture. The tenth article, no doubt, considered that in determining in favor of the superior officer, it also determined in favor of him having the greater number of vessels under his command; and that probable case, to which the court has alluded, must only be considered one not foreseen or provided for by the proclamation. And, in such a case, a judge must decide according to the known spirit of his Majesty's proclamation, and those legislative acts which have passed on this subject. Under the present existing regulations, there can be no difficulty in deciding how the prize should be distributed in this instance. The equity of the regulation *respecting captains of vessels who may be actual [*103] joint captors, applies with equal force to flag-officers, under similar circumstances. The inconvenience which must arise to the service from admitting that latitude of construction to the terms, "directing and assisting," must prove a sufficiently cogent reason to reject any such latitude. One of its extraordinary consequences must be, that Sir John Duckworth and Sir Alexander Cochrane are entitled to share in all prizes taken by the Mediterranean fleet during their coöperation in the West Indies. If your lordships shall be of opinion this principle of constructive direction and assistance is inadmissible in the present case, whether the squadron of Sir John Duckworth is determined to be acting solely under the sanction of the admiralty, or without any sanction and upon his own responsibility, the interest of Sir Alexander Cochrane, as flag-officer in a joint squadron, must be materially served, and his proportion of prize considerably increased.

Dallas, same side. As the right of Sir Alexander Cochrane is admitted by all parties, it remains only to show what share he is by law entitled to claim. As the case now stands, this depends altogether on Lord Collingwood's claim being admitted or rejected. From the whole tenor of the proclamation, he can have no possible right to the prize. In support of this assertion, I must also beg leave to claim for Sir Alexander Cochrane the full benefit of what has fallen, in the very able and conclusive argument of the learned counsel, in support of the claim of Admiral Dacres. By the seventh article, no flag-officer on the station from whence Sir John Duckworth departed can be entitled to share in his prizes, as he is not within the operation of the exception. By the eighth, in [* 104] cases of joint capture * under different flags, the proportion the different flag-officers are entitled to is most accurately defined. Thus, perhaps the flag-officers might share less than the inferior officers, where more flags than one, and of different stations, are engaged in the capture. Hence, if Lord Collingwood derived any right to share, it could only be from the proportion of prize allotted in the distribution to Sir John Duckworth, and not from that of Sir Alexander Cochrane. The eighth excludes his lordship from any share in the latter's prize; the seventh from any in that of the former; and, most probably, your lordships will be induced to decide upon the principle of the seventh article, as having a direct reference to the situation of his lordship and Sir John Duckworth, no orders having even been issued from his lordship for undertaking this voyage; although it is by no means intended to urge that this quitting was by any means criminal. Should the decision turn upon the principle of the eighth article, it will be attended with most advantage to Sir Alexander Cochrane's particular interests; but whether it be in conformity to the obvious tenor of the one or the other, it must be attended with the most serious advantages to the actual captors.

Leach, in reply. The arguments in support of these appeals have been principally deduced from the seventh article of the proclamation, upon which, it has been asserted, our cause principally rests. This is by no means the fact. The claim of the respondents is founded totally on the general principle of directing and assisting, taking the terms in their clear unambiguous sense. The plain interpretation I also admit to be most consistent for the interests [* 105] of the * parties, and the general benefit of the service. The quitting a station mentioned in this article, means simply quitting that relation in which the inferior is considered to be whilst

under the command of his superior. In this sense, the inferior may quit the station to which he has been appointed, and yet maintain this relation. Whether, therefore, this relation subsisted at the time of capture, is the important question for decision, and this is altogether a question of fact. I would even submit, that Sir John Duckworth is included within the clause relating to flag-officers detached on a particular service, with orders to return. He could not but be aware of his commander's wishes in the circumstances under which he was placed, and what would necessarily be his orders, could he possibly receive them. Promptitude is particularly necessary to anticipate the danger which appeared imminent. For such cases, and even those of inferior importance, the nature of the service had given to officers in his situation, a virtual discretion. This amounts to a permission, though not perhaps in express terms; and, acting upon such a permission, he must be concluded to engage in the enterprise relying on the accustomed sanction of his chief. To deny this discretion would be to injure the service, degrade the situation of flag-officers, and endanger the country's best interests. This discretion, in a case when a capture is made by blockading squadron of a vessel within the limits of the blockading station, is admitted by all, should this vessel be attempting to enter the port blockaded; but it will extend much farther, and sanction the capture, should she appear to have no intention of entering the port at all. There is a general duty imposed on every officer by his commission to distress and destroy the enemy, to *protect and succor our ships and those of our [*106] allies. This general duty should ever actuate an officer, whatever may be his particular destination or occupation, and is only subject to one restriction, namely, that the particular service to which he has been appointed shall receive no detriment by this exercise of his discretion in performing the more general duty of warfare. In some instances it has been objected, this exercise of discretion might be dangerous. Admitted: yet this permission to exercise a discretion is supposed to be ever regulated by prudence, and probability of success. It is absolutely expedient for the service; and if success could ever justify the exercise of it, this distinguished officer certainly was entitled to that sanction upon which he relied, and for securing which he appeared so solicitous throughout the cruise. The facts already stated show his anxiety to inform his commander, and also the conviction he himself entertained, that he was acting in the relation I contend for,—that of an inferior under the command of a superior. * This particular enterprise is undertaken expressly in the conviction, that the Spanish fleet cannot put to sea, to prevent which he had been appointed to that station. In this opinion he was also borne out by the fact. The appeals are supported on the ground of his

The Diomedé. 1 Acton.

desertion from his duty. Such an argument may be introduced here to support a civil interest; but that it never entered into Sir John Duckworth's mind may be collected from his answer to his lordship's letter by The Acastá, wherein he speaks in terms that show he is no delinquent in his own estimation. He must have quitted this station, therefore, in pursuance of general orders from his commander, or from some other paramount authority. Lord Collingwood, it is [* 107] plain, * had a power to control the enterprise from the frequency of communication during it, yet he never exercised it; and after the month of December, Sir John Duckworth writes no more to his lordship, having been already convinced of his acquiescence in the conduct of his operations by previous letters, and the verbal communications of Captain Dunne, purposely despatched to confirm him in the prosecution of this enterprise. The principles upon which his lordship's claim is founded are made stronger by the very objection urged against the claim. It is said, that as he had been detached to follow the Rochfort fleet, and did not come up with them, his discretion or his commission was at an end. Had he met the Brest fleet without seeking them, should he not have engaged it? Had he received undoubted information that it threatened our colonies, should he have left it to devastate and destroy? He obtains this information, and acts upon it in strict conformity to his duty, and the discretion vested in him. Though he lost the first fleet at sea, this discretion justified his pursuing them to the West Indies, where he had strong reason to conjecture they had bent their course. In the case of *Harvey v. Cook*,¹ the judgment of the court, which pronounced against the claim of the commander-in-chief, proceeded upon the ground of admitted disobedience.

SIR WILLIAM GRANT. Is it contended this disobedience is any other than that here mentioned?

Certainly. Captain Milne left his station, and proceeded afterwards, without any orders, to convoy to Europe the trade, for [* 108] which purpose another vessel had * been expressly appointed, but had not then arrived. Sir John Duckworth went in pursuit of an enemy, which must, but for his activity, have escaped, and, perhaps, ruined the trade of our colonies. To the case of *The Orion*, it is not necessary to make any reference, since it appeared the captor was acting under the express orders of the admiralty. The principle I contend for will bear me much further. Had Sir John Duck-

¹ *East's Reports*, vol. vi. p. 234.

worth gone under express orders to the East Indies, and taken a prize within the limits of the admiral's station there, there can be no doubt of Lord Collingwood's title to share. Had he no express orders, it must still be as clearly made out by this construction and implication as acting under the command and control of a superior.

With respect to the claim interposed on behalf of Admiral Dacres, it must be admitted, that no orders could have issued, or be supposed to have issued from him ; therefore, in this capture he cannot be supposed to be either directing or assisting, although the capture took place within the limits of his station. The *Magicienne*, upon whose assistance he builds his right to share, did not act subject to his orders ; she *pro re nata*, had ceased to be under his authority and command. The latter part of the first article completely overturns any claim on the part of Admiral Dacres. Upon the fourth no claim can be founded, as it refers solely to captures made by vessels within their own station, and not acting conjointly with others, and Sir John Duckworth derives, not as passing through the station of Admiral Dacres, but in consequence of assuming The *Magicienne*, under his command, as superior officer, and actually making a joint capture. Upon the tenth article, Lord Collingwood must be included "within the number of flag-officers, acting together in this [* 109] capture, by his constructive counsel and direction. Upon all the facts of this case, it appears Lord Collingwood was from time to time directing and assisting in this capture, that he was responsible for the enterprise undertaken in consequence of general orders issued by him, and is, therefore, with his inferior flag-officers on his station, entitled to a share in the flag-eighth.

SIR WILLIAM GRANT. Are you disposed to contend, that even Sir Alexander Cochrane, in consequence of his being assumed under the command of Sir John Duckworth, an inferior flag-officer under Lord Collingwood, is entitled to share in all prizes made in the Mediterranean station ?

Such an inference, perhaps, might be drawn from the circumstance of his having been assumed by his superior officer, who was detached from the Mediterranean station.

The court, after consulting for a considerable time, expressed a wish to take further time to deliberate.¹

¹ The decision in this case not being pronounced previous to the vacation, and the work having gone to press immediately after the conclusion of the session, we are unavoidably compelled to give it a place in our next number. [*Post*, p. 239.]

[*110]

* L'INVIDIATO, Casnacich, master.

July 13, 1809.

Delay in exhibiting further proof, suspicious. If unreasonable, and beyond a time prescribed for introducing further proof, an affidavit required, to account fully for the delay, prior to any permission given for its introduction.

IN this appeal from a decree of the High Court of Admiralty, respecting part of the cargo of L'Invidiato, a Ragusan ship, which had been conditionally condemned as prize to the captors, unless further proof of property were exhibited within a certain space of time, a question arose, whether, after the expiration of the term prescribed for exhibiting further proof, the appellants might be permitted to introduce those papers ordered in the court below, but which had been detained by the uncertainty and delays incident to the communication between this country and the Ottoman empire.

Dallas, for the captors, stated this vessel on a voyage from Smyrna to Amsterdam, and claimed for Ragusan subjects, had been condemned in the High Court of Admiralty, as a prize to his Majesty, being captured prior to a declaration of hostilities; part of her cargo proved to be the property of Ottoman subjects, had been restored after further proof had been introduced, and the remaining part, respecting which no additional proof had been furnished, in pursuance of the order of the court, had been condemned by interlocutory decree, unless further proof should be exhibited before the month of March, 1808. The time prescribed had transpired nearly sixteen months. There must necessarily arise a suspicion, that the delay had been occasioned by a total want of fair and satisfactory documents, and that the [*111] intervening time had been *employed in constructing and preparing such papers as might answer the fraudulent purpose of the claimants. This there was the greater reason to suspect from the promptitude with which the other parties had exhibited their proofs, upon which they had obtained restitution of part of the cargo, whilst the papers now endeavored to be introduced, were said to have been made out exactly at the same time with those of the other parties. Against the admission of such proof, there was, therefore, the strongest reason to object, in which case the condemnation of the goods in question would ensue as a matter of course.

Arnold and *Stephen* for the appellants stated — That as the vessel

had been taken in a time of profound peace, without, therefore, any motive for concealing the nature of the property on board, and as there had been only a slight defect in the original proof of property, the parties were entitled to an indulgence founded in strict justice.

[SIR W. GRANT wished to know how they accounted for these proofs not having been furnished at the same time with those upon which the other parties had obtained restitution, though both had been prepared and completed at the same time?]

By the obstruction of the post, and the different route by which these papers had been transmitted, namely, by Malta, whilst the others were despatched overland by Holland. As the anxiety to obtain a safe mode of conveyance had been the real cause of the delay, and the papers had been verified by the British consul in Turkey, there could not be any justifiable objection made to their reception, especially as there was an affidavit by a British merchant residing in London annexed, to prove these papers had not come to hand until after the time appointed in the court below.

Dallas objected — That as eighteen months from the time of the capture had been allowed the parties to produce proof, prior to a sentence of condemnation upon the cargo, the appellants had no claim to further indulgence; and that, unless some line of limitation were drawn, the business of the court must be extremely impeded by the probable frequency of such applications.

SIR W. GRANT considered it would be necessary, before these proofs should be permitted to be introduced, that some further attestation should be made by the parties, in order to show where these proofs had lain during the time which had transpired since their leaving Turkey, as well as the reasons assigned for the extraordinary delay.

[* 113] * THE ST. ANTONIUS, Willems, master.

July 13, 1809.

Application for expenses and damages incurred by detention under circumstances apparently of a suspicious nature, refused, although these circumstances appeared to be so far consistent with the letter of his Majesty's license, as to induce the court below to restore the vessel.

THIS vessel, under the protection of his Majesty's license to trade to any of the ports of Holland, and with liberty to touch at Tonnin-gen to obtain fresh clearances, sailed from Liverpool with a cargo of rock salt. Whilst standing off the islands of Schowen and Walcheren, with an intention to enter the river Maese, she was boarded by The Growler, gun-brig, and carried into Harwich for adjudication. In the High Court of Admiralty the vessel and cargo had been restored, as acting under the protection of his Majesty's license. From this decree an appeal was prosecuted by the owner for costs and damages sustained in consequence of her detention.

The *King's Advocate*, for the captors, objected to the extravagant extent and unjust nature of the demand made by the appellants. The cargo on board had only been valued at 100*l.* when shipped in Liverpool; but a claim was now made for costs and damages to the amount of 1,000*l.*, said to be incurred in consequence of this interruption in the prosecution of her voyage. This was to contend that the captors were liable to be compelled to restore, not only the positive loss sustained by the owners, but also to compensate the probable gain which might have been derived from an undertaking which had been conducted with great impropriety, and in which there were the strongest suspicions excited in the mind of the captors, that the vessel was about to make either the port of Ostend or Dun-

[* 114] kirk, which the license had * given no permission to enter.

Hence, the captors having observed the vessel for a considerable time standing off the islands Schowen and Walcheren, without any apparent reason to justify its continuance in that situation, were induced to suspect the intention of the master was to carry on an interdicted trade with the enemy, and, therefore, performed only a duty in carrying her into Great Britain for adjudication. Whatever loss had been sustained was totally owing to the imprudence of the master of the vessel, and could not justly be demanded from the captors.

The St. Antonius. 1 Acton.

Dallas, for the appellants, stated the hardship and loss sustained through the detention of the vessel by the captors, notwithstanding the master had produced, when boarded, the license of his Majesty to enter the port, which he was then endeavoring to make, but which the uncertain state of the weather prevented him from entering for some days. He, notwithstanding the adverse state of the weather, continued to beat up to the port of his destination; and, as far as wind and weather would permit him, during the whole time never altered his course, although thrice boarded by the captors in this situation. No attempt had been made at any time to approach any other port, although perfectly practicable. After the vessel had been carried into port, the captors became alarmed for the consequences of this unjust detention, and offered to liberate her on payment of their expenses. The owner assented to accommodate the difference by mutual concession, so as that no further expense should be incurred. This proposal was not complied with, and proceedings being instituted, the vessel was restored, but no allowance made *for those expenses unjustly accumulated on the owner by [* 115] the obstinacy and cupidity of the captors. It must be evident, that had it been her intention to have gone into any port of France, she might with equal ease have procured a license for this purpose. Hence, there had appeared no ground for her detention in the court below, but as no allowance had been made for the losses sustained in not bringing her cargo to that market, at a time when it must have sold extravagantly high, and the whole cargo having been since almost rendered worthless by the ship's having sprung a leak in consequence of being run on shore at Harwich, the owner was encouraged to hope, that as nothing had been left undone to satisfy the captors of the justifiable nature of this voyage when at sea, that they would not be permitted to detain her without paying the severe loss and expense which had been incurred by this unwarrantable detention.

JUDGMENT.

Their lordships confirmed the decree appealed from, and condemned the appellants in the costs of the appeal.

Junge Ruiter. 1 Acton.

[*116] *JUNGE RUITER, De Ruiter, master.

July 13, 1809.

Neutral domicil. A *bonâ fide* residing of the proprietor and family, though subject to periodical interruption on his part, occasioned by the nature of his professional avocations, decisive as to national character.

By the decree of the High Court of Admiralty, this vessel had been restored to the owner, (who was also master,) as a neutral vessel, the property of a subject of the Duke of Arenberg, residing at Papenburg. From this decree the captors appealed.

Swaby and *Stephen*, for the captors — If the national character of a ship is to determine that of the master, there will be in this case sufficient ground for condemning the vessel, without referring to the suspicious nature of the trade in which she was engaged. This vessel was taken on a voyage from Tremblade, in France, to a market, laden with salt. She is described by her papers to be a Papenburg vessel, and is furnished with a passport from the Duke of Arenberg. The master, in his examination, states her to be his own property as well as her cargo; that he bought her from a Papenburg merchant, and had constantly employed her since that purchase in the timber trade from Norway to Delftziel, Amsterdam, and Embden. The usual port of resort has been Delftziel; here he has refitted and lain during each successive winter, and she appears never to have been in Papenburg during the ten years she has been his property. Thus she has ever been employed in carrying on a trade from an enemy's port, and consequently to the advantage of the enemy. Hence, upon the principle which influenced the decision of the judge of the

High Court of Admiralty, in the condemnation of *The En-*

[*117] *draught,¹ this vessel must be considered actually the property of the enemy, since the only circumstance that points out the master's connection with Papenburg is his having a nominal domicil there, by its being the residence of his wife, and occasionally that of himself during one half the year. This, if it proves any thing, proves an equal domicil in both places. A transfer appears by her papers to have been made of the property of the vessel. This, it is submitted, is merely an artifice to cover enemy's property, which

¹ Robinson's Reports, vol. i. p. 23.

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may be inferred from the constant money transactions he appears to have had relative to this vessel with a mercantile house in Amsterdam.

The nature of the voyage is also suspicious. The vessel obtains a cargo at Tremblade on adventure. She is thus without any specific port of destination, and prepared to engage in any speculation, or enter any port it may be thought convenient. It is, therefore, submitted that, upon the principle cited in the case of *The Endraught*, the domicil is not fairly made out; and that, upon the doctrine established by the judgment in the case of *The Vigilancia*,¹ the transfer of property is merely made for fraudulent purposes, and that these objections, in conjunction with the doubtful and suspicious nature of the trade in which she was engaged, must prove fatal to the asserted owner's interest, and produce the condemnation of the vessel and cargo.

SIR W. GRANT observed, that as there were two certificates in different periods of peace, proving the vessel to be Papenburg property, and the vessel's trade had been carried on principally to the Eems, the *degree of the court below ought to be affirmed. [*118] A sufficient indulgence had been given in the court below to the captors, by allowing their expenses. With this they should have been satisfied. The court, therefore, thought it only a duty to condemn the appellants in costs.

* AT COUNCIL.

[*119]

M'ANUFF v. WILLIS.

July 15th, 1809.

Mortgage debts, due on West India estates, demurred against as usurious. The demurrer overruled, as informal and contrary to usage. The question of usury not considered to be therefore fairly before the court.

IN this appeal from the Chancery Court of the island of Jamaica, the appellant, the surviving executor of the will of a West India

¹ Robinson's Reports, vol. i. p. 4.

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planter, prayed the sentence of that court might be reversed, which had decreed that the estates of the testator were subject to sundry debts contracted by him during his lifetime, but which the appellant contended had been usuriously incurred, and for which, therefore, the court could in equity give no remuneration.

Hart, for the appellant. The testator, Robert Minto, had, it appears, engaged deeply in speculations in the West India sugar trade, in so much so, that he found himself compelled to borrow money on his estates in Jamaica. On the 1st of August, 1799, by a deed of mortgage, the testator conveyed to the respondent and his partner, Mr. Waterhouse, merchants in the West India trade, a plantation or sugar-work called Water Valley, with the slaves and stock thereon, as a security for 6,263*l.* then due, and for all such sums as should be lent or advanced by the respondent and his partner; and also executed a certain deed of defeasance between the [* 120] same parties, and of the same date, whereby * it was stipulated that, until said sum, and all other sums which might be by him hereafter due to the respondent and his partner, should be fully paid off, this Robert Minto should ship and consign to them in England all the produce of the said plantation in mortgage, and also of another plantation called Dry Valley; and should also agree to purchase from the respondent and partner, or their correspondents, all such provisions, negro-clothing, utensils, supplies, &c., as should be requisite to be imported by him from Great Britain and Ireland, or be purchased in Kingston, Jamaica. During the time Minto should so perform these several agreements faithfully, these merchants bound themselves not to take any measures for the recovery of their demands, until after the expiration of five years from the date of the deed. Willis and Waterhouse, as a further security, obtained the transfer of a mortgage of the plantation called Dry Valley, for 5,000*l.* and interest, by indentures of lease and release, which mortgage had been originally granted by said Minto to one J. Gowland, of that island. Minto continued to borrow considerable sums of money on this agreement, and although experiencing those fluctuations of crops, &c., peculiar to that island, discharged a considerable portion of this increased debt. At this time being possessed of other real estates, particularly one called Jock's Lodge, in the neighborhood of the others mentioned, he made his will, dated 21st December, 1802, investing this appellant, the said Waterhouse, since deceased, and another, also deceased, with the whole of his property, as executors for the performance of this will, and devising this said property to his family; shortly after which, Minto died.

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The executors took *possession of the property, and pro- [* 121] ceeded to apply the net proceeds thereof to the special trusts contained in the will, and the payment of his debts justly due, refusing to pay the debts asserted to be due under the several covenants before mentioned. A bill was filed by the present respondent, as the survivor of the firm mentioned, in the Chancery Court of that island, praying that the matter might be referred to a master, to ascertain the property, and make provision for the payment of the debts due to him on the mortgages alluded to, from the funds in the hands of the executors, or from the sale of the two mortgaged estates; or, in case of this property being insufficient, from the additional sale of Jock's Lodge estate; and that, until the final hearing of the cause, receivers should be appointed for the proceeds of the three estates, the proceeds of the two first to be applied to the liquidation of the mortgage debts, and those of Jock's Lodge to the trusts mentioned in the will. On the 30th June, 1806, the appellant lodged a demurrer to so much of this bill as stated that the indenture of mortgage of the 1st August, 1799, was and remained a subsisting lien and charge upon the plantations Dry Valley and Water Valley, and prayed the court that an account might be taken, and satisfaction made, of the amount supposed to be due on the said mortgage; alleging, as a cause of demurrer, that it appeared by the respondent's own showing, and by his bill, that he had no equity or title whereon such a demand could be legally made. This demurrer was soon after argued before the chancellor of that island, and overruled. Satisfied of the justice of his cause, and the strength of the documentary proofs on which his application *was founded, [* 122] though overruled, he now appeals to your lordships. Of the fact, that the respondent and Waterhouse availed themselves of the pecuniary distresses of the testator, in order to obtain an usurious contract from him, there can be no doubt, from the date of the instrument of mortgage and that of the defeasance being the same. Thus his real property became mortgaged for an accommodation in money, for which he paid usual and lawful interest; whilst his personal property, that is, the proceeds of his real, was again mortgaged for the same debt, and, by being exclusively consigned to them, they obtained, in addition to the commission and percentage consequent upon the homeward consignments of sugar and other produce, also a commission and profit exclusively secured to them, from supplying the necessary stores and consumption of the estate in the West Indies, which he was, by contract, bound to take from these usurious money-lenders in Great Britain. His being bound by a covenant thus securely, certainly proves, beyond a doubt, that it was not with-

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out some material consideration that agreement was entered into. It was solely in order to obtain the loan on mortgage. There may have existed a false delicacy on the part of Minto, who was a party to this transaction, which probably prevented him from exposing its iniquity; but this conduct would be totally inexcusable in an executor. He therefore openly exposes the shameful nature of the contract, and trusts he will not fail to defeat the designs of an usurious violator of the law upon the property of a family totally unacquainted and unconnected with the acquiescence of the parent in this scheme of fraud.

[* 123] * *Sir Samuel Romilly* and *Stephen* for the respondent.

The nature of property in the West Indies is so fluctuating and liable to accident and injury, that on almost all occasions it is found very difficult to obtain money on estates in that country from merchants in this. To countervail these natural disadvantages, planters are in the habit of giving much greater interest for their loans than others who borrow money. The legal interest of money in those islands vary in different places from 5*l.* to 8*l.* per cent., and even more in some particular places; and it is usually the custom on lending money on such property, to require that the produce of the estate be yearly consigned in order to pay off the interest or principal of loans of this description. The lender is constantly the consignee; nor is it unusual also to make such lenders the factors or agent to these estates; and it is well known they must, of course, derive from hence certain emoluments by way of commission or agency. Hence, according to the supposition that these two deeds, one of mortgage, the other of defeasance, were parts of the same transaction, there appears nothing in the contract but that which is every day done, under similar circumstances, with respect to money lent on security from West India plantations. But it remains with the appellant to prove that these deeds, though apparently executed on the same day, were parts of the same transaction, one depending on the other. Of this there is now no evidence before the court.

But from the construction of the demurrer itself, there arises an objection of this court's giving any relief in this case; for the demurrer has, contrary to the usual mode, been made by [* 124] the appellant to part of * the bill filed, and an answer put in as to the remainder. On this irregularity it is submitted to the court, that the demurrer should be altogether overruled, as made solely to protract the payment of debts justly due. The charge of usury made against the respondent would with equal justice be applicable to all bankers in London, who discounted bills

M'Anuff v. Willis. 1 Acton.

for their customers, not solely with a view to the legal discount thereon obtained, but in a thorough conviction that a considerable portion of the money would remain floating in those profitable channels to which they meant to apply it in the course of banking business.

Hart, in reply, contended, that as the intention of a demurrer was to define the point at issue, and expedite the course of justice, it was perfectly fair and correct in the party to demur to part of the bill and answer the remainder. If the practice of bankers alluded to were general, he had no hesitation in saying, that bankers were generally guilty of usury, and would be within the provision of the acts made against usurious contracts, had those advantages been stipulated for by positive written articles, and not left to a sort of implied understanding between the bankers and their customers. But this defeasance was a written fraudulent contract, which it was the duty of the appellant to expose, and that of the court to punish, in the equitable spirit which appeared to actuate the legislature at the time of the passing of the act against such usurious covenants.

SIR W. GRANT. The question is of such material importance, and may hereafter be so often agitated before this and other courts, that I feel disposed, for *my own satisfaction, [* 125] as well as that of the other lords present, to take some time to deliberate whether, first, from the nature of the objection urged to the pleadings, we can with propriety give any relief; and secondly, what that relief should be, and how far it ought to extend. Probably on the next day of sitting we shall be prepared to decide.

On the 18th July the court pronounced the following

JUDGMENT.

SIR W. GRANT. Although it is extremely desirable that justice should as soon as possible be administered between the parties in this case, as well from the facts which have been established upon undisputed evidence, as from the criminal nature of the charge made against one of the parties in the transaction, it appears, under the present circumstances, out of the power of the court to decide further upon the present appeal than by overruling the demurrer. It has been objected, that this is not the manner in which this question should have been introduced to the court, as it must preclude the possibility of giving substantial justice to the parties. The regular

Hadwin v. Lovelace. 1 Acton.

mode in which it should have been introduced, it has been said, would be by bill, that the other party might put in an answer, in order to explain each part of the transaction. In this opinion I also coincide; and such, indeed, would have been my opinion, even if all the covenants contained in the first agreement between the parties had also been included in the second, in which case the usurious nature of the contract would have more clearly appeared.

[*126] *But when the clauses upon which the charge of usury is founded, (and upon which this charge cannot be maintained unless a clear connection between these two contracts can be distinctly proved,) are contained in separate articles of agreement, which may or may not have this fatal reference to each other, it is not consistent with the usage or practice of a court of equity to permit this mode of proceeding. Without assuming, therefore, the covenant to be usurious or otherwise, upon which the court is not prepared or disposed to decide, but leaving the question of a usurious contract open to investigation hereafter, there can be no doubt that, upon the legal objection mentioned, the decree of the court of Jamaica ought to be affirmed.

AT COUNCIL.

HADWIN v. LOVELACE.

July 15, 1809.

Insurance. Plea set up by the insurer that the damages sustained by fire had not been ascertained in the mode prescribed by their particular office, rejected, as the damage appeared to be fairly ascertained.

THIS was an appeal from the Superior Court of Gibraltar, which had condemned the appellant, as the agent of The Phoenix Insurance Company in that settlement, to pay the respondent the total amount of damages sustained by fire in premises insured by the appellant, as agent to that company, and for which he had received the usual premium, on issuing an order to this company to provide the respondent with the necessary policies.

JUDGMENT.

SIR WILLIAM GRANT. The fact of the insurance and the conflagration are both admitted. The *quantum* of damages [*127] sustained *would, therefore, it is probable, be the only

The Nordstern. 1 Acton.

point the court would be called on to decide, were there not an objection made by the appellant as to the manner in which the damage seems to have been ascertained. Here the appellant alone seems to blame. After the fire he is required to attend a survey to investigate the loss. This he refuses, without assigning any reason, but signifying his intention to protest against any claim that might afterwards be made against the company. After some time the respondent brings his action in the civil court; the appellant pleads he is not prepared, and is sentenced to pay the amount of the loss sustained. From this he appealed to the Superior Court, stating, for the first time, the reason of his objecting to the demand, namely, that the demand had not been substantiated by the respondent agreeably to the proposals of the company for effecting the insurance and ascertaining any loss that might be sustained in order to entitle them to repayment. This could not fairly be attributable to the respondent, since the appellant had absolutely refused to assist in ascertaining the damages sustained. Notwithstanding the respondent had not exactly complied with the printed requisitions of the company for ascertaining the property lost, the two inferior courts had been of opinion he had fairly accounted to them for the claim instituted, by his own affidavit, and the certificate of several merchants who had attended the survey. Hence the present appellant became answerable in his own person, by the decree of the court below, for the amount of the damage, from which we cannot see he has any just reason to appeal, and therefore confirm the decree.

* NORDSTERN, Samsing, master.

[* 128]

July 18, 1809.

Claim on principle of joint capture, rejected. To sustain such claim it is not sufficient to show a general coöperation only, or one for purposes distinct from that of capture, but absolutely necessary to prove that the coöperation had a distinct reference to the capture, which capture should be the joint produce of this coöperation, and the object for which the vessels were united.¹

A QUESTION arose as to the right to share in the cargo of the prize

¹ [The following cases have been decided respecting joint captures : — The *Felicidade*, 3 W. Rob. 45 ; The *Vryheid*, 2 C. Rob. 16 ; Le Bon Adventure, 1 Acton,

The Nordstern. 1 Acton.

in question, on the part of several officers of a squadron of his Majesty's ships employed in the blockade of the port of Cadiz, asserted joint captors. The cargo of the vessel had been condemned in the Vice-Admiralty Court of Gibraltar, as prize to the actual captors. This sentence had been confirmed on appeal by their lordships, so far as referred to the condemnation of the property as prize generally, reserving the question by whom taken.

Swaby, for the appellants. Under general orders issued by Lord St. Vincent, as commander of the Mediterranean fleet in 1798, to Sir John Orde, to proceed with a squadron to blockade the port of Cadiz, in order to prevent the egress of the enemy's fleet, which was then in a state of preparation for sea, and detained all vessels passing between Spain and the Spanish West India islands; the usual dispositions for a blockade were made by that officer; the ships of the line under his command were disposed at some distance in the offing, keeping up a communication with each other, and extending in a circle outside the mouth of the harbor, whilst the frigates and lighter vessels were placed within the harbor, with orders to cruise as near in shore as they could with safety, in order to watch the motions of the enemy. The communication was constantly kept up between them and the exterior squadron, and on a [* 129] * particular signal made from the fleet by the commander, all the frigates engaged in this service were to approach as close to the enemy's works as possible, without materially endangering themselves, for certain purposes of the blockade. Under these regulations, the actual captors, The Emerald and Thalia, forming a part of the inner squadron, were, on the 30th March, 1798, cruising in shore, and observed the prize coming out of Cadiz, which was soon after boarded by The Emerald, and sent into Gibraltar for adjudication, where the vessel was restored as Danish property, but the cargo condemned as lawful prize to The Emerald and Thalia, which were

211; La Virginie, 5 C. Rob. 124; The Island of Trinidad, 5 C. Rob. 92; L' Amitie, 6 C. Rob. 261; The Zepherina, 2 Hagg. Ad. R. 317; La Furieuse, 1 Stewart, 177; The Flight, 1 Stewart, 559; La Belle Coquette, 1 Dod. 18; The Odin, 4 C. Rob. 318; The Guillame Tell, Edw. 6; The Bellona, Edw. 63; The Forsigheid, Edw. 124; La Niemen, 1 Dod. 9; Buenos Ayres, 1 Dod. 28; The Union, 1 Dod. 346; The Financier, 1 Dod. 61; The John, 1 Dod. 363; The Diligentia, 1 Dod. 404; The Genoa, 2 Dod. 88; The La Henrietta, 2 Dod. 96; The Galen, 2 Dod. 89; The Melanie, 2 Dod. 122; L'Etoile, 2 Dod. 106; The Cape of Good Hope, 2 C. Rob. 274; The Fadrelandet, 5 C. Rob. 120; The Aviso, 2 Hagg. 31; The La Flore, 5 C. Rob. 339; The Stella del Norte, 5 C. Rob. 349; The Sociedade Feliz, 2 W. Rob. 155; The Nostra Signora del Dolores, 1 Acton, 262; The Minerva, 2 Acton, 112.]

then the only claimants. This sentence of condemnation as prize generally was confirmed on appeal to your lordships, and an intervention granted to let in the claims of the remaining ships on that particular service. The question upon which, therefore, the court has now to decide, is whether the capture was made in consequence of the dispositions of the whole blockading squadron, and that system of concert and coöperation established by the commander on the station? The case of the appellants is founded on the facts already stated, with respect to the general enforcement of the blockade, in conjunction with the peculiar circumstances under which this particular capture was made. During the blockade, the commander on the station received information that a Danish vessel laden with Spanish property, and bound for the Spanish West Indies, was about to depart from the port of Cadiz. This, according to custom, was inserted in the order or notice-book, from which the several lieutenants of the ships under his command had transcribed it, with others, for the regulation of their conduct. Thus it appears, that the whole fleet had been apprised of the intention of this vessel to *sail, [* 130] and were consequently perfectly prepared to prevent her escape. It is admitted, however, that at the time of the capture it is rather doubtful whether any of the line of battle ships were in sight, or whether the prize was seen by any of them until the following day. This admission, it is presumed, cannot affect the claim of the appellants, as the ground upon which they appear before the court is that of a preconcerted scheme of coöperation. If it can be established, that such existed at the time, and that these frigates could not have maintained their situation so close into shore, as to enable them to have made the capture at that particular time and place, in defiance of the Spanish ships of the line within the harbor, the remaining vessels of the squadron must be considered entitled to share as joint captors within the literal meaning of the prize act, and also of the proclamation of his Majesty relative to the distribution of prize. The evidence upon this part of the case is most satisfactory. Sir John Orde, who was succeeded in his command the day previous to the capture by Sir W. Parker, under orders from Lord St. Vincent, in his examination, alleges the whole fleet was, at the time of the capture, coöperating with the frigates in shore, and was so circumstanced as to have been able to render them any necessary assistance, had any signal been made for that purpose, as had been previously in all cases agreed on. He gives it as his opinion, that unless the fleet had been continually coöperating with these lesser vessels, they never could have maintained their position, or continued the blockade. In this opinion his secretary coincides. Another officer, Lieutenant Medli-

The Nordstern. 1 Acton.

cot, belonging to The Hector, which, with The Warrior, was engaged in the interior line of blockade, in conjoint operation with the actual captors, states, that on the morning of the capture he perceived *from the mast-head the whole transaction distinctly with the naked eye, and could also perceive a cloud of smoke surrounding The Emerald, which he supposed to be occasioned by firing a gun to bring the prize to. The fleet, he adds, were then in sight, coöperating in the blockade. Sir John Orde also thinks, from the circumstance of The Emerald having joined the squadron previous to the capture, that Captain Waller must have been acquainted with the notification made of the intended departure of the prize. The general bearing distance of the frigates from Cadiz lighthouse, by the testimony of these different witnesses, is stated to be from two to four leagues, though sometimes much nearer; that of the ships of the line from seven to eight leagues, or less, as wind and weather permitted. No material deviation from this general statement is to be discovered in the testimony of the witnesses examined on the part of the actual captors, except with respect to the general bearing distance of the fleet from the frigates, which is contended by them to be much greater. Yet, even admitting their statement to be correct, the principle upon which this claim is maintained cannot be affected thereby. Of the general objects of the blockade, one is admitted to be, the detention of all vessels laden with Spanish property, and bound for the Spanish West Indies. A particular object pointed out to the attention of the ships engaged in this service, is the capture of this identical vessel. The capture is therefore expressly embraced both within the general and particular objects of the association or coöperation.

SIR JOHN NICHOL. Was this a blockade of the enemy's vessels of war, or a regular blockade of the port? This distinction is [*132] extremely necessary, and *upon this difference it is probable we shall have to decide the case. A regular blockade is usually and formally notified; it is probable, therefore, had any such existed, this prize might not have attempted to go out of port, through a consciousness of the danger she would incur. Indeed, upon this material consideration the judgment of the court below seems already to have decided, and not without reason. The question in the Prize Court below turned, not upon the blockade, but upon the nature of the property. The vessel was restored, though breaking this asserted blockade, whilst the cargo was condemned.

Whether the blockade was a regular and civil blockade, it is for the court to determine. There appears to have been uncommon

strictness and attention paid to the examination of all vessels, whether coming into or sailing out of the harbor, and the express orders under which the blockade was commenced, seem to establish the opinion, that so far at least as a trade in Spanish property to the Spanish settlements in the West Indies, (which is the prominent feature in this cause,) it was a regular civil blockade, and that this species of trade was altogether interdicted. So far, therefore, as relates to the condemnation of the present vessel, there can be no unfavorable distinction made whether this were, strictly speaking, a military or a commercial blockade.

Stephen, same side. There are two principal grounds upon which the claim of the asserted joint captors may be, with equal confidence, maintained. First, upon the general principle of coöperation, which cannot be in the least questioned, if the fleet can be proved at the time in sight; and, secondly, upon the letter of *the [*133] order issued to the actual captors in common with the rest of the fleet, to detain this particular vessel. With reference to the first, the evidence of Lieutenant Medlicot, of *The Hector*, is decisive; and though a releasing witness, (and such he appears to be,) is, perhaps, not the least liable to objection, and his testimony ought to be received with caution, yet, in his statement that the fleet were absolutely in sight at the time of capture, he is strongly corroborated by the opinion of a most unexceptionable witness, Sir John Orde, who thinks, from their relative situation, they must have been in sight.

SIR WILLIAM GRANT. He states the ground of his opinion to be, rather the general disposition of the fleet and frigates, than their actual situation. This may give rise to a very material distinction.

It must be granted, certainly, that the general-bearing distance of the fleet from the shore, or rather from Cadiz lighthouse, was liable to great fluctuations, some of the witnesses for the actual captors stating it to be at times forty to fifty miles, whilst those for the appellants generally state it not more than from three to five leagues. The species of support which the frigates generally might derive from this coöperation, it will remain with your lordships, therefore, to decide whether effective or otherwise, as well as the proportion of credit due to the respective witnesses. But the part of the case upon which the appellants are most inclined to rely, is the unity of the enterprise in which all these vessels were engaged. This must be decided upon principle; and here I shall refer your lordships to the decisions in the

case of *The Harmonie*, *De Boer*, and also in that of the capture of the island of *Trinidad*.¹ In one of these, an enterprise in [* 134] which part of the fleet separated * from the remainder, for a time, was not considered a detached service, but rather an extending the arms of the fleet to increase the range of its operation; while, in the other, though a distinction was judiciously made between the right they might have to share in the capture of the ships, and in the capture of the island, the claimants were admitted to share in the latter, although they had separated from the main squadron which reduced the island, and had not again joined it until the morning on which the final articles of surrender were signed; and this upon the principle, that they had been originally placed under the orders of Admiral Harvey, for the express purpose of reducing this island, which, but for justifiable circumstances, they would have assisted in throughout, and hence, though not in sight at the moment of the first disposition displayed by the governor to surrender, yet their subsequent junction entitled them to share upon the general principle of joint enterprise and coöperation. In opposition to this principle, I only recollect a solitary case which may be cited. In this case, *The Gene-roux*,² decided in May, 1803, a claim was made on the part of his Majesty's ship, *Queen Charlotte*, to share in a prize taken near Sicily, in the Mediterranean, in consequence of having given intelligence respecting the prize to the actual takers, by which means she was finally captured. The allegation was refused, as it appeared, that though such a notice had been given, the vessels had separated from each other; and *The Queen Charlotte* had been, at no time after it, within fifteen leagues of the captors. In this instance, however, there existed no previous orders for a union of force, no common object of association or coöperation.

Upon principles of sound reason and judicious policy, it is [* 135] highly expedient to shut out litigation * where a coöperation is distinctly proved, merely on the circumstance of the vessels thus coöperating not being in sight, since, if this general plea be often successful, it may induce officers of ships to hazard themselves, their vessels, and even the whole coöperating fleet, by endeavoring to make captures out of sight of the squadron to which they are attached. Considerable caution is therefore necessary in admitting this plea, particularly when it is considered what an extensive latitude is given by acts of the legislature to constructive assistance, whether considered as encouraging the captors, or intimidating the enemy. In this

¹ C. Robinson's Reports, vol. v. p. 92.

² Lords.

The *Nördstern*. 1 Acton.

case, there readily exists that coöperation and assistance, which the rule of construction only supposes, for the advantage of the service, probably to exist. The cruising of the fleet outside the harbor in the offing, is admitted to have been absolutely necessary to enable the captors to obtain this prize, and, therefore, must be considered actual coöperation. The equity of the case even requires that the claim should be admitted on the part of the remaining blockaders, who were equally, if not more, subject to the harassing inconveniences of a long protracted service.

SIR W. GRANT. It seems to be unnecessary to insist further on the question of fact, whether the fleet were in sight. This part of the case stands upon extremely deficient evidence, and is principally conjectural. The point to which the attention of the court should principally, if not exclusively, be directed, is whether such a coöperation existed as to make the capture in question necessarily dependent and consequent thereon.

**Stoddart and Harrison*, for the actual captors. To prove [* 136] that such a coöperation did not exist at the time very little will be necessary on our part. Upon the facts of the case already stated, as considered separately from the authorities cited, there seems to remain little doubt that the capture was made without any coöperation as to that precise object. The coöperation admitted is evidently for very different purposes. The principle upon which this claim must fall to the ground may be drawn from the decision of the judge of the High Court of Admiralty in the case of *The Vryheid*,¹ taken in the engagement between Admiral Duncan and De Winter. The doctrine of constructive assistance was here very fairly tried; and as the claimant's ship, *The Vestal*, was admitted to have been sent to procure the assistance of Admiral Duncan and the remainder of his squadron, for the purpose of engaging the enemy, the claim as far as it depended on joint enterprise, may be supposed equally admissible with the present; yet here the allegation was absolutely rejected, and the parties not permitted to go into the proof. In this decision particular reference also was made to the case of *The Mars*,² where a still stronger claim on the principle of joint enterprise, as well as coöperation, was rejected. In direct violation, then, of the authority of this judge, you are now called upon to extend the effect and meaning of constructive assistance, so as to include the present

¹ Robinson's Reports, vol. ii. p. 21.

² Lords, 1760.

claimants. The capture, it is contended, was made in compliance with the order of Earl St. Vincent to continue the blockade, and be particularly attentive to intercept all enemy's vessels passing to or from the Spanish West Indies and Cadiz. This cannot be supposed to include the detention of a Danish vessel laden with property [* 137] perty documented * as neutral. Such was the prize. This order refers not to her. The order, or rather notice, by Sir John Orde, never reached the captors; it, therefore, forms no part of the case. In the case of *The Generoux*,¹ the claim of joint capture was supported on several distinct grounds—the intelligence given respecting the prize to the actual captors, conjoint enterprise, and actual coöperation. The fleet had been so disposed, that the enemy with her convoy could not possibly get into Malta; and means were taken to drive these vessels into the hands of the actual captors. Thus these vessels appeared to be acting under the same commander, and coöperating for a specific purpose, of which the claimants were the absolute apprisers, yet your lordships, without hesitation, decided against the admissibility of the claim. In the case of *The Kinders Kinder*,² although *The Defiance* was only five leagues from *L'Aigle* at the time of the capture, which was made without chase, and in a thick fog, the claim was also considered without sufficient foundation. In *The Vrow Constantia*,³ decided in February last, it was held, that a claim to joint capture could not be supported, except the capture arose out of the express object for which the parties had been associated or united. As far, therefore, as authority can go, the claim of the present parties, admitting the analogy, is already decided against upon the clearest principle. Upon the matter of fact we have to object, that the blockade was never intended to be a commercial blockade. With respect to this particular vessel, it is said, however, to have embraced that object. The notice mentioned is the sole proof of such an intention. Captain Waller does not admit he ever received any intimation of this intention. Yet, even if he [* 138] had, the case of *The Generoux* would have overthrown * any claim on the principle of previous intelligence, as in that instance extraordinary notice had been given, and considerable coöperation afforded. A salvage interest, which is mentioned in the case of *The Franklin*,⁴ had been set up by a British ship on the circumstance of apprising a Spanish vessel (bound from New Orleans to Bordeaux, and ignorant of the existing hostilities) of the danger she was

¹ See page 134.² Lords, 1807.³ Lords.⁴ Robinson's Reports, vol. iv. p. 150.

The Nordstern. 1 Acton.

about to incur; here your lordships thought fit to decide against admitting the claim,¹ on the authority of which judgment it has since been held, that the claim of military salvage cannot be sustained. It is altogether unnecessary to argue this case on general principles of policy or the interest of the service; it must be too apparent, that to admit these claims lightly would be injurious to the interests, destructive of the characteristic ardor of the navy, and productive of endless futile litigation. There would, in such a case, be no end to claims of this description; and the court might, with equal propriety, extend the right of joint capture in every instance to the whole collective navy, and thus take away the strong stimulus of individual interest, which it has hitherto been the primary object of legislative enactment to excite and render secure. It is only necessary to add the circumstances attending this vessel's adjudication, and the length of time which afterwards transpired previous to any claim introduced on the part of the appellants. This vessel was carried into Gibraltar immediately after the capture, and restored; the cargo, on further proof, was condemned. No claim whatever was then set up of joint capture, although the whole fleet were apprised of the intended adjudication. Nor was it until upwards of three years afterwards that such a claim was set up by *The Warrior* and *Hector* as having been *in sight; and more than five years after that [* 139] this claim was introduced on the part of the fleet, as jointly coöperating. Several, however, of these latter claimants have since, in despair, withdrawn their claims. These considerations, added to the strong authorities cited against the constructive principle contended for, will no doubt satisfy your lordships that no such claim can fairly be maintained on either motives of policy or strict equity.

Swaby in reply stated—he was willing to drop altogether the term blockade in the present instance, and merely denominate it a service whose principal object appeared to be the detention and bringing up of all vessels for examination, in which all the several claimants were coöperating by express orders. The cases alluded to were not analogous. In *The Vryheid* the claimants were employed on a detached service. In *The Generoux* an order had also been issued for a detached service; the body of the fleet continually changing day after day, so that no distinct claim could be fairly made out for any. In *The El Navarro*, the claim to salvage was justly rejected, as not founded on the only proper and general ground of such application

¹ *El Navarro*. Admiralty, Nov. 11, 1793. Lords, July 18, 1795.

The Nordstern. 1 Acton.

pro opere et labore. No such averment could be there made with truth. The only remaining question before the court, therefore, was, whether this capture was a separate service, independent of the purpose of general association. The lateness of the introduction of the claim for the remainder of the fleet, he added, was merely owing to the inattention of the person intrusted with that charge.

JUDGMENT.

SIR W. GRANT. Upon the authority of the cases which [*140] have been cited, a principle appears to have *been established perfectly just and consistent with the interests and welfare of the service. Where a capture is strictly made in association, the parties so associated shall be admitted to share. We are now called upon to extend this principle to a very considerable length indeed, and give an extremely vague, constructive meaning to the term association. We cannot, however, go the length necessarily requisite to include the present claim. There certainly appears to have been a joint enterprise undertaken between the captors and the appellants; but this was expressly limited to a precise object, namely, a military blockade. The proceedings, therefore, in the court below turned not upon a breach of blockade, but upon the question of property. A breach of blockade was not imputed to her; she was, therefore, restored as neutral property. The cargo alone was condemned, and this upon further proof, as to property solely; which could not have been the case, had the coming out of port been part of the crime imputed, for in fact this was admitted by the parties. The sole question upon which this case must be decided, and which has, therefore, in the course of the argument, been principally attended to, is whether it is sufficient to establish a right to share on the part of asserted joint captors, that the capture shall take place during the time of a joint enterprise. Upon this we are decidedly of opinion, that it is not sufficient a joint enterprise shall exist at the time, except it expressly refer to the capture in question, or, in other words, that the capture grow out of the purpose and object for which the parties have been united, and be the joint produce of an actual coöperation, and the object of union. We, therefore, confirm the sentence appealed from, and reject the claim on the part of the remainder of the fleet.

* *LITTLE WILLIAM*, Brown, master. [*141]

November 24, 1809.

Blockade of the Elbe. Instructions having been given by the owners to inquire of the vessels cruising off the Eyder respecting the existence of the blockade.

Further proof admitted, to ascertain the actual intention of the master in approaching so closely the mouth of the blockaded port.¹ Innocent intention established. Ship and cargo restored. Appellants condemned in costs of both courts.

THIS vessel, with her cargo, was, on the 23d November, 1807, condemned by the judge of the High Court of Admiralty, as sailing in wilful violation of a notification of his Majesty's principal secretary of state, issued on the 11th March, 1807, declaring the rivers Elbe, Weser, and Ems in a state of blockade. From this sentence the master, claimant of the ship for Jacob Sperry, of Philadelphia, and George Salkeld, merchant, of London, claimant of the cargo, as the property of several American merchants, appealed. On the 21st November, 1808, the claim of William Lyman, Esq., consul general of the United States of America, was exhibited for the ship and cargo, as American property. An appearance on behalf of the captor was accordingly given, and the appeals assigned for sentence.

* *Dallas* and *Jenner*, for the captor. The sentence of con- [*142] demnation, passed on this vessel and cargo in the court below, appears to have been grounded as well upon the numerous culpable inconsistencies in the oral and documentary evidence exhibited in the cause, as upon that established principle of general law so repeatedly recognized by an uniform series of decisions both in this and other courts of prize, that no neutral shall be permitted, after having been apprised generally of the existence of a blockade, to sail to the mouth of the blockaded port, for the purpose of ascertaining there whether such blockade actually exists. Were such a practice permitted, the immediate consequences would be, that neutrals would be too strongly induced to forget moral obligation, in the prospect of increased advantages arising from a trade with interdicted ports, and that a system of fraud and artifice would be resorted to, for the purpose of eluding the vigilance of blockading squadrons, and slipping into such ports in the darkness of the night, or under other circumstances favorable to a similar design. The

¹ [See *The Betsey*, 1 C. Rob. 332.]

master states, in his deposition, that the destination of this vessel was for Hamburg, unless that port were blockaded, in which case she was to proceed to Tonningen. The mate and seamen examined say, only, that they had been informed by the master that such was her destination. This circumstance certainly induces suspicion, as the letters on board are all found directly addressed to persons residing in Hamburg, and the vessel herself is consigned to Mr. Vogel, a merchant of that city. One of these letters mentions, that the writer (one of the shippers of this cargo) "learns with great regret that a blockade has been imposed by the English on the rivers [* 143] * Elbe and Weser, as it is probable they will not relax in pursuing this mode of retaliation for a considerable length of time." No doubt, therefore, exists that the parties were acquainted with the existence of the blockade, and even with the probability of its continuing much longer than after the arrival of this vessel in Europe. In the preparatory examination of the master, he does not scruple to state that the whole of the papers on board, relating to the ship, were delivered up to the captor after the capture; yet in his subsequent affidavit, in support of the claim, he, alluding to a certain letter to be found in the papers in this cause, purporting to be the letter of instructions from the owner, Sperry, to him, respecting the management and conduct of the ship, avers that he received this letter from Sperry at the time he commenced this voyage; that it was on board when the capture was made, but that he did not deliver it up with the other ship's papers, conceiving it unnecessary so to do. This must be considered an instance of the grossest fraud in an experienced master. Upon this imperfect evidence the judge ordered the cause to stand over, in order to give time to the master to explain the nature of the instructions he had received, with respect to the place at which the inquiry was to be made, relative to the actual blockade of the river Elbe. Two affidavits were introduced: The first sworn by the master, in which he deposes that he had on two former voyages, with a similar contingent destination to Hamburg, if not blockaded, sailed with orders to obtain the necessary information, as to the blockade of the Elbe, at Heligoland, where he was under the necessity of calling, at all events, for a pilot, that being the only place of procuring one, either for the [* 144] * Elbe, the Weser, or the Eyder, as the insurance is otherwise void in case of accident, such navigation being considered pilot's water. In both these voyages he proceeded to Heligoland, near which he fell in with British cruisers, which, after indorsing his papers, permitted him to proceed to Tonningen, Hamburg being then also blockaded. And, referring to the letter of instruction

before mentioned, wherein the owner writes — “ If you should ascertain and obtain permission to proceed to Hamburg, from the cruising vessel at the entrance of the Eyder, you will please proceed ” — he deposes that he believes the same arose from the owner's having been informed at Philadelphia, (where it was generally known at the time of The Little William's departure from thence,) that leave had been given, by one of his Majesty's ships forming the blockading squadron, to the American ship *Temperance* to proceed to Gluckstadt, a Danish town on the Elbe, notwithstanding the blockade of the said river. He believes it was his owner's intention that he should first proceed to Heligoland, for the purposes mentioned; nor should he have attempted to proceed to Hamburg, unless he had received information there that no danger would be thereby incurred, and that the blockade had been relaxed or discontinued. His course, he observes, whether to Hamburg or Tonningen, was the same, until he arrived at Heligoland. The second affidavit is made by Sperry, the owner's brother, who states therein, that being at Hamburg, on the commercial concerns of his brother, he received advice that this vessel would shortly sail for Tonningen; whereupon he began to prepare a return cargo for her, which he despatched partly by land and partly by water to Tonningen, where it *remained [*145] until, being disappointed by the vessel's not arriving at Tonningen, he put these goods on board other American vessels. No vessel in which his brother was concerned had, during its continuance, attempted to violate the blockade of the Elbe; and, from inspecting his brother's letter, he states he is perfectly satisfied it was his brother's intention to direct the master to proceed to Tonningen, unless he should learn at the mouth of the Eyder, from any English vessel cruising there, that the blockade of the Elbe was raised; and that finally, in all the various shipments his brother had made to that part of Europe, no vessel in which he had any concern had ever broken the blockade of the Elbe. On this parol and written evidence the court below, having maturely deliberated, condemned the ship, with her cargo, as sailing to a port in blockade, with intent to ascertain, at the mouth of the blockaded port, whether such blockade in fact existed. The propriety of this sentence will appear from a review of the evidence exhibited in the cause. For a considerable time the master admits he had been engaged in superintending different vessels, in which the owner of the ship in question had laden goods, all which vessels, he admits, sailed with similar contingent destinations, and continued to prosecute that destination until they were warned by British cruisers not to attempt to enter the Elbe. The present voyage is admitted to be the third of the kind; and there can be

little doubt entertained, from the perseverance displayed in this sort of uncertain destination, that, had circumstances proved favorable in any of these voyages, the master would have endeavored to defeat the intention of the blockading squadron, and consulted the secret

wishes and obvious interest of the proprietor. The principle of law, with respect to blockaded ports, is perfectly well defined and generally understood. On this principle, any vessel sailing from one European port to another, knowing it to be in a state of blockade at the time of her departure, would necessarily be subject to condemnation. A relaxation of this principle has been considered expedient, as to American vessels, on account of their extreme distance from the seat of war, and the impossibility of obtaining immediate information of the actual state of the ports of Europe at the time of setting sail. They are, therefore, permitted to proceed with a contingent destination for such ports. But it has always been held that the master must procure that information, with respect to the actual existence of the blockade, which is necessary to regulate his determination, before he arrives at the mouth of the port supposed to be in a state of blockade. And every deviation from this judicious and necessary restraint, imposed on vessels sailing with contingent destinations, has been uniformly punished by condemnation. It is further required that, in all contingent destinations, the ship's papers must fairly and explicitly state the contingency itself. The first fact to be complained of in this case is, that there has not been a fair disclosure of her destination in the ship's papers. In the instructions the vessel is consigned to Vogel, residing at Hamburg; and the master directed to ascertain, from the cruising vessel at the mouth of the Eyder, whether the blockade in fact existed, and also to obtain permission to enter the Elbe, if blockaded. On the face of these instructions, therefore, it will evidently appear the master was to do that which, in point of law, he could not do without subjecting the vessel to condemnation, since the

cruising vessel mentioned can mean no other than one of the vessels engaged in maintaining that blockade. That such was the intention of the owner is distinctly to be inferred from the affidavit of his brother, Frederick Sperry, to whom this vessel was in part intended to have been consigned. This affidavit, though introduced for the purpose of explaining favorably the instructions to the master, admits the fact that the inquiry was to have been made at the mouth of the blockaded port. And notwithstanding the master's positive and reiterated assertion that it was absolutely necessary he should call at Heligoland for a pilot as well as to obtain every possible intelligence respecting the actual state of

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the port of Hamburg, the affidavit of Mr. F. Sperry makes no mention whatever of this asserted necessity for touching at Heligoland, though all parties must have been aware how extremely material it might prove to establish this point. The letter of the owner to Vogel cannot but have considerable weight in deciding what was the intended destination of this vessel. In this letter he consigns to his care the interests of the vessel, and in express terms mentions that all passengers from Hamburg to Philadelphia shall pay at Hamburg each thirty guineas, adding, "the whole primage of 5 per cent. from this to Hamburg you will please to pay the captain, and from Hamburg here he is to have a similar allowance on the whole freight payable here." Upon the admission, therefore, of the claimant and others equally interested in the success of this voyage, it must be inferred that the real destination of this vessel was for the port of Hamburg, with an intention to elude the blockading squadron if possible, or if unsuccessful in this attempt, she was, through constraint alone, to alter her course to Tonningen. No satisfactory excuse or apology can be offered by the owner for the instructions which he himself *gave to the master, since, were it actually the intention of [* 148] the owner that such inquiry should have been made at Heligoland, there would have been in this instance no necessity for the vessel's bearing up for the Elbe. All uncertainty would have been removed before she had proceeded so far on her voyage, and acting upon the authentic information to be derived there, no danger could have arisen to the vessel had it been in the contemplation of her owner to prosecute a legal and justifiable voyage. With respect to the claim interposed by the American consul, it is presumed no such claim can now be argued, as it will be found to refer to various documents not now before the court, but which have been very irregularly introduced along with the papers in this cause, and printed in the form of an additional appendix.

Addams stated that he had been applied to on the part of the consul of the American government, to support a claim for this ship and cargo as the property of American citizens. The papers alluded to had been introduced for the purpose of authorizing and supporting this application.

By the Court. All these different goods, together with the vessel itself, have been each specifically claimed as the property of various individuals. No other claim can, therefore, be heard with respect to this property. It seems rather as if the claim were necessary for the purpose of sanctioning the introduction of these papers very irregularly.

Arnold, for the claimants. It is a striking feature in the present case, that this vessel being captured off the Start Point, [* 149] * nothing can be urged against her except a possible intention to defeat the purposes of the blockade. On this presumption, which is certainly one that should not be lightly taken up, the whole argument for the captor is founded. The peculiar situation of neutrals in the neighborhood of the rivers Elbe and Weser, during different periods of the war, has furnished a principle upon which the orders of His Majesty in council respecting such neutrals have usually proceeded, and upon which, no doubt, the court will now be disposed to act with respect to the vessel claimed. Several of the orders issued at various periods during the present war relative to the blockade of the Elbe state each as a preamble, that such order has been considered necessary on account of the occupation of the neighboring towns and the banks of this river by the enemies of Great Britain. These orders for a blockade have been temporary, and in general withdrawn as soon as the cause ceased and the French troops withdrew from the shores of that river. No intention, therefore, appears on the part of His Majesty to restrict the trade of Hamburg: no such object was in the contemplation of any of these prohibitory orders, and we find that the merchants of Hamburg were permitted, notwithstanding, to carry on their trade, so far as it did not interfere with the direct purpose of the blockade. Even this restriction was removed when the cause ceased; but as soon as it recurred, the blockade was renewed and made to include all the ports from these rivers to the harbor of Brest. Yet even in pursuing this rigorous system with respect to the trade of these neutral cities, a modification or relaxation took place, which removed all unnecessary restraints, and from the frequent instances displayed of a disposition on the part of his Majesty's government to serve these [* 150] * distressed people, there can be no doubt entertained, that could their trade be carried on in any other way that might be pointed out, which should not have interfered with the known purposes of Great Britain for cutting off the resources of the enemy, such mode of carrying on their trade would have been permitted, if not protected and encouraged by this country. This well known relaxation, which permitted the communication between these towns along the Flats or Watten, naturally leads to this inference amongst others, that for an American, to continue his connections with Hamburg was not thought inconsistent with the general views of Great Britain, or hostile to the purposes of the blockade. The case of the claimants cannot, therefore, be injured by admitting that the general nature of their trade was direct to Hamburg, and that in the present instance it

was their intention to have entered the port of Hamburg, though actually blockaded, had any safe-conduct or permission been granted by persons authorized, as they had been informed was the case when a similar application had been made by the American ship *Temperance*, for permission to proceed to Gluckstadt on the same river. The circumstance of the vessel's being consigned to Vogel, residing at Hamburg, cannot fairly be said to induce a suspicion that her destination was absolutely for that city. It seems to have been the intention of the parties to have innocently traded with their accustomed consignee, and should the vessel be ultimately obliged to enter the port of Tonningen the concerns of these parties would probably have been as judiciously managed as by a consignee at Tonningen, since the distance between these towns is inconsiderable, and the communication frequent. The general rule of blockade has been fairly laid down, and the exception in favor of American neutrals seems to be founded *on the increased hardship they [*151] must labor under were no contingent destination permitted, as from their extreme distance from the seat of war the blockade must last longer as against them than European neutrals, nor could they ever avail themselves of those frequent short interruptions of the blockade, of whose commencement they could only be apprised at the moment they had concluded. To obviate the numerous frauds to which it was apprehended might be resorted to, were the permission to sail with a contingent destination not accompanied with definite rules for the purpose of obtaining accurate information as to the state of the port supposed in a state of blockade, it is required that vessels of this description shall make inquiry and ascertain the state of such port at a safe and permitted place, and in a safe and permitted manner; and to show that they entertain no disposition to elude the blockade, it is particularly necessary that such inquiry shall not be attempted to be made at the mouth of the blockaded port. This restriction is confined to the mouth of the port blockaded and to the blockading squadron as at its mouth; and when it is required that neutrals are not to inquire of the actual state of a port supposed to be in blockade, at its mouth, it is not intended to make the inquiry of the blockading squadron in itself unlawful, or a sufficient cause for the condemnation of the vessel. Circumstances might arise to render this almost unavoidable, or at least perfectly justifiable; for it cannot be contended, had the blockading squadron been blown off by stress of weather, or been compelled on any other account to leave that particular station, and during such cessation of any actual blockade this vessel had fallen in with the squadron and made this inquiry, *that it would involve her in any criminality or subject her [*152] to condemnation.

On the particular circumstances of this voyage it is necessary to observe, no concealment appears to have been attempted. The views and wishes of the parties are displayed with more than usual candor and explicitness. It is admitted the general course of their trade was for Hamburg, and that such would have been their wish in this instance, had not untoward circumstances prevented it. The private letters found on board, and all the bills of lading, mention her destination to Tonningen. This is also found in the letter of instructions which it has been said was intentionally and fraudulently concealed. The master disclaims any such intention, and in this he is entitled to some credit, since he might easily have suppressed it altogether, had he considered its production injurious to the claim made. The fair inference is, that he acted ignorantly in neglecting to deliver it up, for this letter is, perhaps, the best possible document in the case to prove the real intention of the principal owner to be perfectly consistent with the neutral character. Mr. Sperry there writes, "I wish you to proceed with all possible despatch for Tonningen, and on arrival forward my letter per express to Mr. C. T. Vogel, Hamburg, to whom you are consigned, &c. If you should ascertain and obtain permission to proceed to Hamburg from the cruising vessels at the mouth of the Eyder, you will please proceed, but on no account attempt it unless you are well assured the blockade of the Elbe is raised." The master, by not at first presenting this letter, evidently

betrays no great anxiety to give a favorable color or complexion to his case, since [* 153] there cannot possibly be any more satisfactory proof exhibited of the upright intention of the owner. In consequence of the claim made by the master for this vessel as the property of Mr. Sperry, all the papers which could be adduced in its support were anxiously sought for, and this letter was voluntarily introduced by the master, who, in his affidavit, states that he considered it unnecessary to produce it at the time of the capture, probably considering it rather as a private communication between his owner and himself than a ship's paper. This may be attributed to an error in judgment, (for erroneous it certainly is,) but should not be deemed an omission deliberately resolved upon for the purposes of fraud.

From the annexed affidavits it is to be collected that the usual custom of the trade has been to call at Heligoland and take a pilot. That, as connected with the insurance of the vessel, it was absolutely necessary to secure the owner against subsequent accidents. Here it was probable he would be provided with such information as might remove all doubt from his mind respecting the course he should pursue, whether for Tonningen or Hamburg. It appears,

however, to have been understood by all parties, that he should as he approached the Eyder ascertain from any British vessel cruising there, whether he might obtain permission to enter the Elbe from the commander supposed to be upon that station, as such permission had before been granted to the American ship *Temperance*. To pass the Eyder was necessary. Therefore, any inquiry made there was perfectly lawful, and so it must have been had even the vessel of which it was intended the master should have made the inquiry at the entrance of the Eyder been one of the squadron blockading the river Elbe. The circumstance *of her being [* 154] at the entrance of the Eyder would have rendered any such inquiry by a vessel bound for Tonningen perfectly legal.

BY THE COURT.

SIR JOHN NICHOL. It has ever been my wish to avoid as much as possible all interruption of counsel in the course of argument; but in the present instance it will not be considered immaterial to the interests of the parties to observe, that from the letter of instructions itself, which I now hold in my hand, and have perused with attention, it appears the inquiry is directed to be made of the cruising vessels off the Eyder, not the cruising vessel. It is put in the plural, whilst in the court below it is observable it was taken to be in the singular, and a considerable part of the argument turned upon this assumption. There is a want of accuracy in the handwriting, which to a casual observer might leave it doubtful whether it were the singular or plural, but from comparing this termination with other similar ones, I am clearly of opinion it was intended for the plural. This may perhaps shape the question more favorably for the present argument, and perhaps serve to show that it was not in the contemplation of the claimants the master should make the inquiry off the mouth of the blockaded port.

Dallas. The direction, however, is confined in the one case or in the other to the cruising vessel or vessels on that particular station. It remains, therefore, with the court to determine how far such an intention may affect the interest of the claimants. 'Tis certain the cruising vessels off the Eyder cannot be at the same time considered one of the blockaders of the Elbe, *since one is [* 155] distant from the other twenty miles, yet it might be one of the ships employed on that station for the express purpose of the blockade of the Elbe. For it is not the circumstance of inquiry at the mouth of the blockaded port which solely furnishes the principle upon which condemnation should ensue. Taking the instruction,

therefore, in the plural number, it will be advisable to examine with a considerable degree of caution, whether the master's former experience of the manner in which this blockade was usually conducted, might not have led him to attempt, under the present vague instructions, what he must be aware was in itself perfectly illegal and inconsistent with the neutral character.

Stephen, also for the claimants. On all questions of fraud the attention of the court should be particularly drawn to the investigation of what may be the actual interest of the parties. When it is the interest of the parties to do that which is in itself legal, and asserted to have been intended, all suspicion of intentional fraud should be removed. At least it must be in candor admitted that there exist no inducements for fraud, but every inducement to the contrary. In reference to the peculiar nature of the blockade of Hamburg it may be remarked, that there has not at any period existed the same strong inducements to violate this as to violate the blockade of other ports. All possible allowances were constantly made for the inevitable distress of these neutral cities, relaxations were made in their favor, and a very considerable trade permitted to be carried on in an indirect way across the Watten. The only object a neutral merchant could have in view by directing a vessel to elude the blockading squadron and enter the Elbe would be to obviate the necessity of the sub-
[* 156] sequent *interior* navigation, which was the only mode permitted for the conveyance of the cargo into the river Elbe, had the master continued his course to Tonningen. The temptation is, therefore, comparatively trifling, and inadequate to the risk and danger likely to be incurred. Such has been the beneficial effect of this relaxation that there are hardly any instances wherein this blockade has been broken. And when the distressed state of these merchants is taken into consideration, whose interests have thus been sacrificed to the British belligerent rights, all possible indulgence should be given them in permitting these species of contingent destinations, and no rigorous rule of interpretation should be applied to letters of instruction respecting these voyages, when so many circumstances conspire to make these instructions loose and indefinite. In the case of *The Betsy*, *Goodhue*,¹ the less rigorous rule of construing the instruction given was adopted, and the vessel restored, though sailing under circumstances nearly similar. Tonningen had during this period become an *entrepôt* or species of warehouse for the trade

¹ 1 Robinson's Reports, 332.

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of Hamburg. There was no consumption for the various goods daily landed in that port. Hence the greater necessity existed for the owner of this vessel to require that the master should make all possible inquiry to ascertain whether he might safely enter the better market; for had the blockade been removed previous to his arrival in Tonningen, his situation would be peculiarly unfortunate to find himself pent up in Tonningen without a hope of a market, whilst others had availed themselves of an opportunity it was also equally his interest to improve. Indeed, in the present case, the claimants are entitled to much more consideration from the court than in that of *The Betsy*; for at the period of time in which this voyage was undertaken, the master knew *that he durst not [*157] enter a British port to make any inquiry according to the enactment of the Berlin decree, which proscribed any such entry under the severest penalty. The instructions were founded on a twofold contingency, either a cessation of the blockade, or a permission granted to enter notwithstanding its continuance. Upon the possibility of either, it was but fair and just the neutral merchant should calculate, for the latter had been known to occur in different instances, both with respect to the port of Havre and Hamburg. Whether the contingency were expressed in the bills of lading or only in the other papers found on board is perfectly immaterial, since from the nature of this voyage it appears she must necessarily arrive first at neutral territory, which is all that is required to sanction her making the inquiry. The strict meaning of the restriction concerning the place at which inquiry may be legally made seems to amount to this, that no neutral vessel shall, on pretence of making such inquiry, be in a place where otherwise she was not entitled to be. If speaking to a British cruiser in those seas be criminal, for the purpose of ascertaining the fact, the natural inference must be, that should no information be obtained in the neutral territory on the subject, a vessel must proceed absolutely for the port supposed in blockade at the hazard of capture and condemnation, or direct for the other port, let its distance be what it may beyond that into which it might perhaps have entered with safety had its real state been ascertained. A contingent destination would in this instance be deprived of almost all its advantages. It has been argued that a vessel thus circumstanced has no right to proceed to inquire in a more distant port of the actual situation of a nearer *port [*158] supposed to be in blockade. Where is this assumed principle to be found? No such rule exists. Nor would it be consistent, since the act of the vessel's proceeding beyond the port proves most distinctly that she had no intention to enter it, unless she should

first ascertain it might be done without hazard. The suspicion of any intention to violate the blockade is in this case removed, and the instructions delivered to the master appear to point out to him that line of conduct in pursuing which it was supposed he must have acted with the strictest propriety. If a doubt can still be entertained on the nature and tendency of these instructions, the parties it is presumed will be permitted to introduce further documents in explanation.

Dallas, in reply. In questions of fraud the same inference is to be drawn from the proof of an intention to commit as from the actual commission of the fraud itself. The intention here is to be collected from the various circumstances of this particular voyage. It has been admitted first, that this vessel could not inquire at the mouth of the blockaded port; and secondly, that she could not sail under a contingent destination, if that contingency were concealed or endeavored to be concealed, without hazarding her condemnation. On these admissions the present case may easily be decided. If the destination of a vessel be suppressed, it has generally induced such suspicion as led to her condemnation, or at least to exclude the owner from giving any explanation in justification of her delinquency. The case of *The Betsey* differed from this in the material circumstance of the distinct and explicit avowal of the destination [* 159] in contingency. * Here the same indulgence cannot, therefore be extended, for the most material document to prove the contingent destination was for some time suppressed. The master can take no great credit to himself for its voluntary production at last, since it has been introduced for the purpose of making out a case for the claimant, and should, in every point of view, be looked upon with suspicion. To direct any inquiry to be made of a blockading squadron off a port in blockade, is, in effect, to inquire at the mouth of that port, whether the inquiry is made or not, and must be followed by all the legal consequences resulting from an actual inquiry. Here, then, it must be considered, that this vessel made, or would have made, such inquiry; for, by the mouth of the port blockaded, is meant not only the portion of sea inclosed between the extreme points of land, but, with a more extended latitude, that space or line in which vessels usually cruise for the purpose of intercepting vessels either going in or out of the port. The cases of *The Spes* and *Irene*,¹ includes the principles upon which this case must be decided;

¹ Robinson's Reports, vol. v. 76.

in the judgment upon these cases, the learned judge lays it down expressly in reference to American vessels sailing under contingent destinations, that "the neutral merchant is not to speculate on the greater or less probability of the termination of a blockade, to send his vessels to the very mouth of the river, and say, if you do not meet with the blockading force, enter; if you do, ask a warning, and proceed elsewhere;" and referring to the indulgence extended to Americans during the last war, permitting vessels to sail from America with a contingent destination, which contingency was to be regulated by the information they should receive on arriving in Europe; he adds, "But *in no case was it held that they might sail [*160] to the mouth of a blockaded port to inquire whether a blockade, of which they had received previous formal notice, was still in existence or not. The act is to be taken as completed by the attempt. If the owners are innocent, they must in law be bound by the indiscretion of their agent." And so exactly similar are the instructions given in the present case and in those of *The Spes and Irene*, that the terms of the judgment applying to the particular and minute circumstances of those two cases, are strikingly applicable to the present, where the learned judge adds: "This is not a case of persons suffering merely by the indiscretion of their agent. The owners here are directly implicated by the instructions which they themselves have given." Such an authority, must press with peculiar weight upon the court, when the exact similarity of the circumstances of these cases is so strikingly apparent. The justification which has been attempted, upon the principle of the restrictions imposed on American vessels from entering the ports of Great Britain by the Berlin decree, cannot possibly be admitted, since any such admission would have a direct tendency to give effect to the hostile measures of the enemy.

The court pronounced for the appeal, and leave was given to bring in affidavits to explain the instructions given by the owner to the master.

Dallas suggested that leave should also be given to the captors to offer any explanation upon the subject. If the owner's intention could be proved by the captors to be criminal, he contended condemnation should *follow. Nor was it immaterial to [*161] ascertain whether the vessel stationed off the *Eyder* was actually one of the blockading squadron.

BY THE COURT.

SIR WILLIAM GRANT. I cannot see that any material consequence

would result from any further investigation on that particular point. The doubt now existing in our minds arises upon the ambiguity of the instructions to inquire of certain vessels. To direct the inquiry to be made off the Eyder, appears, under the peculiar circumstances of this blockade to be fair, and unattended with any suspicion that fraud was intended. It is upon that part of the instructions which relates to the cruising vessels, or vessel, as it was taken in the court below, that we are anxious to obtain more complete information. Here the ambiguity rests.

The attestations of Joseph Michael and Edward Killey,¹ of Philadelphia, mariners, were produced in court, stating, that they had been long acquainted with the course of trade to the rivers Elbe and Eyder; that vessels in either of these voyages were delivered on their arrival off Heligoland to the Heligoland pilots, and by them to the river pilots of the Elbe and Eyder; that British cruisers are frequently met with on the west side of Heligoland, near to the island, which are not of the blockading squadron, when Hamburg is blockaded. That Heligoland was considered the entrance of the Eyder, and all vessels must steer for it proceeding either to the Elbe or Eyder.

[* 162] * To these attestations was added that of the owner, Jacob Sperry, declaring the only instructions given to the master were those contained in the letter formerly mentioned. It was his intention the vessel should proceed for Tonningen, unless the master should learn, not from report or rumor, but from British cruising vessels, (not of the blockading squadron of the Elbe,) that the blockade had been removed; referring for corroboration of this attestation to his letters to his brother and the master, in which he writes that this vessel was to proceed to Tonningen, unless the blockade of Hamburg should be raised and occasion a change of voyage. Copies of several other letters were adduced from his letter-book, to the same effect, stating that her destination was for Tonningen.

SENTENCE.

Upon these additional proofs the court pronounced for the appeal, condemned the appellants in the costs of both courts, and restored the ship and cargo.

¹ January 25, 1810.

* THE DISPATCH, M'Kever.

[* 163]

December 7, 1809.

Blockade of Bremen. Objected, that an American vessel sailing from America, with knowledge of the actual blockade of the port for which she has a contingent destination, should, in her papers, disclose, in explicit terms, the place at which the inquiry was intended to be made relative to the fact of its continuance.

Overruled, it being ascertained that Heligoland, whence pilots were always procured to secure the insurance of vessels entering that harbor, was the usual place for vessels to make inquiry.¹

Appellant condemned in costs.

THIS American vessel, captured on a voyage from Philadelphia, with a contingent destination to Bremen, if not blockaded by a British squadron, had been restored by a decree of the High Court of Admiralty. From which sentence an appeal was prosecuted by the captor, Charles Chant, Esq., commander of the private ship of war *Betsey*.

Arnold, for the owners. This vessel sailed under charter-party for the port of Bremen, in June, 1807, subsequent to advices received by her owners of the blockade of that port by the British.² Notwithstanding such information, the owners, in conjunction with the merchant to whom the vessel had been chartered for this voyage, calculating on the probability of a cessation of the blockade prior to the arrival of the vessel at her destined port, concurred in the expediency of giving her a contingent destination, so that should the port of Bremen continue in a state of blockade on arriving in Europe, the master had orders to make the river Jahde, or even *Tonningen*, should the blockade extend to the Jahde. The proof of property is admitted to be satisfactory. The sole question, therefore, upon which the court will have to exercise its judgment will be, whether this vessel was, at the time of capture, in the prosecution of a legal voyage. A question which, from the peculiar circumstances under which this voyage was undertaken, * it will not be very difficult to de- [* 164] cide; especially when it is recollected how strongly applicable the arguments and principles so successfully laid down in the case of *The Little William*,³ are to the situation in which the respondents

¹ [The *Betsey*, 1 C. Rob. 332, note.]

² See Notification of March 11, 1807.

³ Page 141.

The Dispatch. 1 Acton.

are now placed. The justice and necessity of permitting to American vessels a more extended latitude with respect to a contingency of destination, are sufficiently obvious; and, as the conduct of the owners in this case will, upon examination, be found strictly consonant with the spirit of this relaxation in favor of neutrals so cut off from immediate intercourse with the seat of war, or intelligence with respect to the changes which so frequently occur in the operations of the belligerent powers of Europe, this court will doubtless be equally disposed as the court below to grant them all the benefit which it was intended the fair neutral should derive from this relaxation of the strict principle of national law. In the conduct of the respondents, as well as the ship's papers, and the owner's instructions, every thing is characteristic of candor and integrity. The charter-party made between the owners and Mr. Wotherspoon, who had undertaken to provide the vessel with freight, both in the outward and return voyage, discloses the contingent destination of the vessel. The goods laden by different shippers are indifferently described in the respective bills of lading as going to Bremen or the Jahde. The letter of instructions to the master, specifically points out the contingent destination, as well as the circumstances which were to regulate that destination. The great object of the different parties, who, it seems, all concurred in the expediency of these precautions, appears to be a desire to place their goods under the management of a particular house at Bremen, to which they had been strongly [*165] recommended as safe and fit persons to become the consignees of their goods. Whether, therefore, the vessel put into Bremen, the Jahde, or even Tonningen, where it was decided she should unload her cargo, did the blockade, of which they had received advice, extend to both the former ports, this desirable object would have probably been effected, as the distance is not very considerable between them. Under these circumstances, the judge of the court below, on the first hearing, thought proper to direct inquiry to be made, as to the verbal communications or instructions the master might have had on this particular subject with the shipper or owners, previous to his departure for Europe. An affidavit was, in consequence, admitted, in which the master stated, That, before the formal and regular charter-party was signed, information was received at Philadelphia that the Weser was blockaded; whereupon there were several consultations between Mr. Wetherspoon and the owners of the ship, respecting the intended voyage, in which it was considered that the blockade might be raised before the ship arrived in Europe, and it was therefore agreed that the ship should go to Bremen, if not blockaded, but otherwise to the river Jahde; upon which the

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master observed that the Jahde might be also blockaded, and, wishing to know what he should do in that case, Mr. Wetherspoon replied that such blockade was highly improbable, but that if it did take place he must go to Tonningen; and it being also required how it should be ascertained whether the Weser continued to be blockaded, the master observed, as the fact was, that he must, at all events, go to Heligoland for a pilot, and that he should there ascertain the fact, and act accordingly; it was perfectly understood between himself and the other owners of the said ship, and

* Mr. Wetherspoon, that the said ship was to proceed direct [* 166] to Heligoland, for the purpose of taking a pilot, and ascertaining whether or not the Weser continued under blockade; and that, in case such blockade had been raised, he was to proceed to Bremen, but otherwise he was to enter the river Jahde; from the time the ship sailed from Philadelphia, and at the time of the capture, it was his fixed intention to proceed to Heligoland, and if he then learnt that the blockade of the Weser was raised, to proceed to Bremen, but otherwise to the river Jahde; before commencing the voyage in question he had made many inquiries, respecting the navigation of the North Sea, of various masters of American ships then in Philadelphia, and who had been accustomed to sail to Bremen, Hamburg, and the neighboring ports, who invariably told him, as he verily believes the fact to be, that it was necessary for ships, whether bound to the Weser, the Elbe, or the Eyder, or to any other intermediate port, to make Heligoland, and there to procure a pilot; and that he should not have attempted to have approached the mouth of the Weser without taking a pilot from Heligoland; as he understood and believed, if any American ship should attempt to enter without such pilot, and be lost, the insurance would be void, inasmuch as such navigation was considered as pilot's water. This affidavit appeared to account for the conduct and intentions of the parties interested in so satisfactory a manner, that the judge decreed the ship and cargo should be restored. From the documents, therefore, already successfully submitted by the respondents in this cause in the court below, it is contended that the legality of the voyage in which this vessel was engaged is satisfactorily proved, the appeal altogether groundless and *vexatious, and that the [* 167] sentence of the court below should therefore be affirmed with costs.

Dallas and Jenner, for the captor. It will be material to examine in what particular respects this case and that of *The Little William* agree, and in what they are dissimilar. They are both vessels sail-

ing from America to Europe, about the same time, and under well grounded apprehensions of finding certain ports, to which they generally directed their course of trade, in a state of blockade, and, finally, were detained by virtue of one and the same order of council, which, in fact, distinctly proclaimed the Elbe, the Weser, and the Ems all in strict blockade. So far the cases are alike. The distinctions between them, in other respects, are essential. In favor of the present claim it is argued, that the contingent destination is disclosed in the ship's papers and letters on board, whereas in the case cited the private letters on board differed from the ship's papers, as to the asserted contingency, and induced suspicion that she intended to violate the blockade. In this instance, it is presumed the present case has a fairer claim to candor, and is less equivocal. It must, however, be apparent the case of *The Little William* has a feature of integrity which the present does not possess. In the instructions given to the master, the place and the persons of whom the inquiry respecting the existence of the blockade was to be made, were expressly pointed out. Here the contingency alone is disclosed, and every thing else indefinite, no doubt for the purpose of covering the fraud, should the vessel be detected entering the very mouth of the blockaded port. No direction is given to inquire of any particular vessels navigating those seas. The advantage to be derived

[* 168] from leaving things in this *state of uncertainty was obvious; and it is therefore only just to suspect that this advantage was in contemplation of those who so studiously avoid mentioning that which would necessarily be the first question proposed by the master, after a contingent destination had been agreed upon. Upon this point of law issue appears now to be joined, and there can be little hesitation in coming to this decision, that it is not competent to a vessel to sail from an American port to Europe on a contingent destination, with a previous knowledge of a blockade *de facto*, without disclosing in express terms where it is intended inquiry shall be made to ascertain the fact. As it must be made in the course of the voyage, the intended mode of ascertaining this material circumstance should be a prominent feature in a letter of instructions. The rule of law is positive, that it must not be made at the mouth of such port. By your lordships' decision in *The Little William*, it seems it is not necessary it should be made during the prosecution of her voyage up the Channel in a British port, although it would appear at least a convenient rule that it should be so. From this general rule, and the principle established by the judgment in that case, it becomes more necessary to require that the plan shall be distinctly pointed out by the instructions, in order to provide against

any possible fraud and artifice. The facts of the case, also, are such as must tend to heighten the suspicion of intended fraud. In the preparatory examination, the master only states that he was steering for Bremen, to which the ship's course was at all times directed. No mention is made that he was steering for Heligoland; of his actual intention to call there we can know nothing, except by inferring that the same course served for both. This amounts, at most, to a bare possibility that his evidence of such *intention [* 169] may be correct. In the attestation of the master, (which, it is observable, was not introduced as evidence until November, three months after the capture and two after the first hearing of the cause,) he deposes that he had made inquiries of some American masters of vessels, if it were not generally the custom for vessels bound to those rivers to call at Heligoland for a pilot. The necessity of calling there does not appear at all impressed upon his mind; it is rather to be inferred he considered it optional. The affidavit admits that it was probable the port of Bremen, or even the Jahde, might continue in a state of blockade, and that the parties had the most complete and satisfactory intelligence, previous to the voyage, of the rigor of this blockade, is proved from one of the letters found on board, in which an American merchant deeply regrets that The Atlantic, a vessel bound from Philadelphia to the Weser, or, if blockaded, to Venet, on the Jahde, had been warned off the Weser, and, perhaps, had not been permitted, as the writer conjectures, even to attempt entering the Jahde; in consequence of which the master had actually sailed for England, from whence he had written for fresh instructions to his owners in Philadelphia. The knowledge of these facts should have bound the parties to have directed inquiry to be made at once in some British port, or at least to determine precisely the place at which it should be made. Admitting, therefore, all that has been established by former decisions, as to the legality of contingent voyages, still the present must be held an exception to cases in general. In The Little William, the owner appears to have been aware of what should be done, and complied with that which is required by law, but was not sufficiently accurate in point of phrase; he was, therefore, *considered entitled to the benefit of far- [* 170] ther proof. Here, although the owner must be considered equally aware of his duty, he neglects it altogether; evidently because it would not favor any scheme of change of intention, after warning or information received. Upon the decision of this court in this cause a most serious and important consideration depends; namely, whether hereafter, vessels sailing under similar contingent destinations shall be permitted, long subsequent to the examinations

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in preparatory, to introduce affidavits disclosing those material circumstances on which it is presumed the original legality of the voyage may be proved. It may lead to a rule that, instead of determining on the legality of a voyage in the usual way, from the ship's papers and the examinations in preparatory, the owner need not make in any of them a distinct and determinate avowal of his actual intentions, but may reserve to a subsequent period the most material points for explanation, and proceed by the summary mode of an affidavit. This must be productive of the most material inconvenience, since that which has hitherto constituted the ground of determination and adjudication in a court of prize need not be disclosed on the face of the ship's papers in the first instance, but a justification of the intentions of the party may be produced at a subsequent period, when most convenient, perhaps, to the persons upon whom just suspicion of intentional fraud attaches.

JUDGMENT.

SIR W. GRANT. If the place at which the inquiry was directed to be made were inserted in the explanation offered, it appears to the court no material advantage would be derived from that [* 171] circumstance. * Neither would its insertion in a letter of instructions be of any great importance. All vessels, it should seem, do call at Heligoland for the purposes stated, where ample information may always be had on the subject. The appeal, therefore, appears to us so groundless that we shall refuse it, with costs.

DIE JUNGFER CHARLOTTA, Otma, master.

December 7, 1809.

Continuous voyage.¹ Part of cargo, consisting of salt laden in France, sold to a Portuguese merchant at Oporto, but not landed, so as to break the continuity of the voyage, condemned as a shipment within the restrictions of order in council, 7th January, 1807. This order held to extend to the property of a vessel engaged in such a trade and lending herself to the exigencies of the enemy. Vessel condemned as lawful prize. Residue of cargo laden at Oporto, Portuguese property, restored.

A PAPENBURGH vessel, laden with salt, sailing from the island of

¹ [For cases respecting continuity of voyages, see *The Maria*, 5 C. Rob. 365.]

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St. Martins for a port in the Baltic, was compelled by stress of weather to proceed to Oporto; here the cargo was disposed of to a Portuguese merchant, the vessel repaired, with part of the proceeds, a quantity of cork laden in addition to the salt already on board for the account of the same merchant, and under charter-party she sailed from thence to Middleburgh, in Holland. In the High Court of Admiralty the judge decreed the cork and master's adventure to be restored, condemned the salt, and restored the ship without freight upon payment of the captor's expenses. From which both parties appealed.

Burnaby and *Stephen*, for the captor. Condemnation of part of the cargo of this vessel ensued in the court below in conformity with an order of council issued the 7th of January, 1807, prohibiting trade by neutrals between the ports of France or her allies. The voyage commenced at the French island of St. Martins, on the 12th of May, in the same year. The original cargo, consisting of salt, was laden there, and * the vessel proceeded as for a port in the [* 172] Baltic, intending, as the master states, to call at Elsinour to ascertain what port he might safely enter. The progress of this vessel, if such it can be called, is singular. From the time she leaves St. Martins, steering her course as it might be naturally supposed for the northward, she is found for several days, as appears by her log and preparatory examinations, nearly in the same degree of latitude; the first latitude mentioned being 46 degrees, the next 45, the two last 44 and 43; thus with an intention to proceed she is stated to have made a retrograde motion for ten days; and this, it is pretended, is to be attributed solely to the excessive violence of the wind from the northward during the month of May, a circumstance which must tend not a little to affect the whole tenor of evidence given by persons on board the ship. Finding there was no possibility of making head, and that the ship began to be disabled, the master resolved, he says, to make for some free port; namely, Oporto; but wherefore Oporto? He had passed along the Spanish coast, and Corunna or other Spanish ports were equally free ports for this vessel coming out of France to enter. Oporto was the place destined by the master to carry on a scheme of fraud which has been fortunately detected, though not adequately punished. Here he finds every thing suited to his purpose; although he says he was distressed for money to repair the vessel, no advantage is taken of him, he gets a purchaser at 30l. per cent. profit for the salt, an article which is a drug at Oporto, and which is admitted to have been very much damaged by the sea. Singularly fortunate circumstances for him, when it is considered he

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was driven to sell because no credit could be obtained by [*173] him but on bottomry * bond at 40 per cent. Of the price of his cargo of salt he only obtained 137 milreas in specie, the rest by a draft on Amsterdam; yet his account of disbursements, whilst at Oporto, amounts to 230 milreas; hence it must be evident he had funds there or else he never could have met these demands. This affords a very strong presumption of falsehood in his testimony and of fraud in his intentions, in entering into this alleged agreement of sale and charter-party. The Portuguese merchant must be considered as his agent, and the vessel the instrument for carrying the scheme into execution. Neither, therefore, can be entitled to credit, and the whole property is deservedly liable to confiscation.

On the principle of law with respect to the necessity of an actual sale and landing, at some intermediate port, of cargoes coming from one interdicted port to another, so as to break the continuity of the voyage, it is observable that this vessel has not even attempted to comply with this regulation. The cargo, as coming from and going towards an enemy's port, was subject to condemnation. The entry into Oporto does not alter the nature of the property; it cannot be called an importation: no conversion takes place; the cargo is not even landed, but continues on board the same ship. In the various cases, similarly circumstanced, which have been brought into Courts of Admiralty, the claimants have in general proved the landing in the neutral port as essential to their case. The present does not even exhibit this inconclusive proof that the goods were in fact imported. Nothing can be argued either from intention, for the vessel enters the port merely through stress of weather; her destination was decided upon, and no circumstances had then arisen to shake this

[*174] resolution of the master. * Here, therefore, a vessel setting sail with the produce of France from a French port affects to be or actually is driven to take shelter in Portugal. While in harbor an agreement is entered into by her master to take her cargo, with an addition for the account of a Portuguese merchant to a port of the enemy. The justification set up is, a sale has taken place, by which the property is neutralized: Upon the authority of several cases decided in this court and that below, no such sale can be admitted by itself to change the property and produce the same effect as an actual importation. Such was the principle laid down in the *Mercury*, *Roberts*,¹ and *The William*, *Trefry*,² when a review was taken of all the cases in point. In the case of *The Thomyris*,

¹ Lords, January, 1802.

² Lords, March 11, 1806. See 5 Rob. 385.

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Russel,¹ lately decided in the court below, a cargo of barilla, brought from Alicante, in Spain, by an American vessel, was transshipped by means of lighters to The Thomyris, then in the harbor of Lisbon, for the purpose of being carried on to Cherbourg, in France; it was held that an ostensible sale and importation of this property merely into the neutral harbor, without a landing, did not constitute a legal importation, or break the continuity of the voyage. Had this been an innocent vessel taking, at Oporto, this cargo on board *de novo*, for Middleburg, without any knowledge of its previous importation there, from an interdicted port, perhaps, had there even been no sale or conversion of the property, the ignorance of the fact and innocence of intention might serve to exempt the vessel from a sentence of condemnation which must be pronounced upon the cargo as property appearing not to have been fairly changed by sale, nor actually intended for importation. Here both ship and salt are liable to confiscation, since the master is not only apprised of the criminal intention of the merchant, but is the person who [*175] brings in the cargo from the enemy's port, and which, without ever landing, he attempts to transport to another port of the enemy, in direct violation of the order of 7th January, 1807, and notwithstanding the indorsement made on his papers by his Majesty's sloop Hazard, enjoining him not to trade between ports of the enemy.

Dallas and *Arnold*, for the claimant. In arguing this case the questions of law and of fact should be treated of separately. In the court below the only point considered with respect to part of the cargo was the nature of the voyage, which the learned judge determined was continuous. None of the suspicious circumstances now alluded to with respect to the sale and expenditures were then introduced into the case. To argue the point of law raised this must be considered a *bonâ fide* sale, and her entrance into Oporto occasioned through distress. No prize court has adopted the principle that a *bonâ fide* sale does not operate to a conversion of a cargo without a landing; the cases cited will not make out any such principle. The continuity of this voyage is effectually broken by the change of property effected by the sale, as well as by the agreement to commence another voyage *de novo* for account of a different shipper. The vessel is, therefore, not within the meaning of the order of council, since she cannot be either in the voyage to Oporto or from thence to Middleburg considered trading between ports in the possession of

¹ Edwards' Admiralty Reports, page 17.

the enemy. In the case of *The William, Trefry*,¹ and the various other cases of continuous voyage enumerated in that judgment, the attention of the court was particularly drawn to the proof of actual importa-

tion by the duties paid in the intermediate port. It is there [* 176]* admitted, that "the truth may not always be discernible, but when it is discovered it is according to the truth, and not according to the fiction, that we are to give to the transaction its character and denomination." The court proceeded, therefore, to examine narrowly whether the landing and duties were colorable, and merely had recourse to for the purpose of deceiving a prize court in case of capture. But these are all cases proceeding on the ground of fraud, when the owners have voluntarily caused the vessel to enter certain ports convenient for their purpose, and in which they themselves generally resided. The present claimant appears under no such imputation. The vessel enters much damaged, through compulsion; the sale originates in distress; all appears fair. The counsel in the argument for the captors have said, that admitting the sale had been fair, yet as there had been no landing, condemnation must ensue. To raise the question of law, therefore, all supposition of fraud must be excluded. When a real sale, then, has taken place to a *bonâ fide* purchaser, it is not necessary to land a cargo so disposed of, to complete the conversion of the property, no more than it would be necessary for a merchant purchasing a cargo at a sale to import it into the place where he may reside in order to establish his property therein. In the case of *The Ebenezer*,² condemned on the principle of continuous voyage, the continuity of the voyage was proved to have been contemplated by the owner, and false papers were detected on board, describing the cargo to have been taken on board at Embden, when it appeared by other evidence it had been brought thither from Bordeaux, and after remaining only three days

at Embden, was forwarded for Antwerp with a new clearance. Here it was * held that fraud should operate to defeat the fraudulent. The sentence proceeded upon the intention of fraud manifested, not upon the circumstance of the vessel's not having unloaded her cargo at Embden; for in a note to that case is mentioned another, *The Schoone Sophie*, laden with colonial produce and bound for Antwerp, but having lain five weeks in the port of Embden, without being unladen, was directed to be restored without requiring further proof, although it was argued there were probable

¹ Lords, March 11, 1806. Admiralty Rep. vol. v. 385.

² Robinson's Rep. vol. vi. 250.

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grounds to suspect the cargo had been imported originally from a French West India island. This decision disproves the principle contended for on the part of the captors, and tends to support the doctrine that a good sale alters the nature of a voyage so circumstanced, and renders it no longer liable to be considered continuous.

Much has been said on the suspicious nature of the circumstances attending this voyage. Where are they to be found? Can any reasonable doubt be entertained that this vessel was compelled to make for Oporto. Log, sailors, and master agree as to the unfavorable state of the weather; with such a wind there was no Spanish port which he could make with safety. When in harbor, the vessel having received considerable damage, was it possible to proceed to sea again without repairs? The cargo is sold to procure funds. The master prefers taking his vessel out laden rather than in ballast, and enters into a fresh agreement to sail to a permitted port. On his examination here he does not deny he brought the salt into Oporto; the bills received in part payment for his cargo are found on board at the time of capture. Can a property thus fairly transferred to a neutral be supposed a proper subject for condemnation?

*An objection has been made to the decree of the court [* 178] below, restoring the vessel and the cork. She appears to have been employed in carrying on a legal trade from Oporto to Middleburg, without disguise or deceit. No objection can be sustained on any established principle to such a trade carried on by a neutral. If no conversion of the property of the salt had taken place, still the cork was protected by being the growth and property of a neutral country. Admitting there was fraud in this transaction originally as to part of the cargo, it would not necessarily affect any other real neutral property on board. In all colonial cases this is admitted, although the fraudulent neutral loses whatever benefit he might derive from the property attempted to be covered. The order of council which was issued previous to the sailing of this vessel was merely intended to apply to a trade actually carried on, and originally intended to be carried on, between ports in the possession of the enemy or her allies. The vessel is by justifiable necessity compelled to take shelter in Oporto, and here she commences, after some time, a new trade, in which she must be considered fairly engaged *quoad* the intention of the order itself.

SENTENCE. December 15, 1809.

The COURT pronounced for the appeal of the captor as to the ship, reversed the sentence appealed from, and condemned her as lawful prize to the captor, and pronounced against the appeal as to the cork,

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affirmed the sentence of the court below in respect thereto, and assigned claimant to bring in the value of the ship.

Pronounced against claimant's appeal, affirmed the sentence appealed from, and remitted the cause.

[*179] *CAPTURE OF CHINSURAH. A GRIEVANCE.

(From the High Court of Admiralty.)

December 15, 1809.

Capture of a factory of the Dutch East India Company by the joint forces of the British East India Company and his Majesty's navy. Sums advanced upon contracts for supplying the factory with manufactures by the Dutch governor on behalf of the Dutch company, proper subjects of condemnation as prize to his Majesty. British company bound to account with the crown for sums recovered on a contract with interest thereon, of which it had possessed itself under an assignment to its agent, executed by the governor of the Dutch factory, having first failed in an action to recover the same in their right as captors. The company assuming voluntarily and without any particular appointment the character and benefit of agent for the crown, assumes likewise all the responsibility and liabilities of an agent. The pending of a suit in chancery here between these two companies respecting this property, which suit had been interrupted by war, objected as a bar to adjudication. Objection overruled. Costs. Expenses. Commission.

THE Dutch town and fort of Chinsurah, in the East Indies, were, on 3d July, 1781, taken possession of by The Nymph, one of a squadron under the command of Vice-Admiral Sir Edward Hughes, and a detachment of the East India Company's troops commanded by Captain Chatfield, and condemned generally as prize to his Majesty, to be distributed at his discretion. From this decree of the High Court of Admiralty two appeals were prosecuted, one on the part of the East India Company, praying the capture might be pronounced a land capture by the forces of the company, and as such not within the jurisdiction of the High Court of Admiralty. Another, on behalf of the admiral, the officers and crew of the said sloop, praying the capture might be pronounced to have been effected by the officers and crew of The Nymph only. Their lordships pronounced against both appeals, confirmed the sentence appealed from, and remitted the cause. In the High Court of Admiralty, after various proceedings, an account of the proceeds was brought in by the company's syndic on oath, which was referred to the registrar and merchants named by the court; who amongst other items reported, that a sum

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of 23,200*l.* had not been added to the account, as it appeared from information given by the East India Company, that the contractor from whom it was due had refused to pay the same to the East India Company, and that a suit had been depending thereon for some time in the East Indies. After several orders and decrees of the learned *judge, and different appeals on the part of the [*180] company, the judge, on the 19th May, 1809, pronounced the said sum then in the registry to be part of the proceeds arising from the said capture, and reserved the consideration of deductions therefrom, and of interest and costs. From this sentence the company now appealed.

His Majesty's Advocate and the *Attorney-General*, for the crown. The proceeds of this capture have been the subject of litigation at various periods since the year 1781. First with respect to the parties entitled to share, and subsequently as to the different species of property whether prize or not. Previous to the capture of Chinsurah the agents of the Dutch East India Company had entered into many contracts with neighboring merchants or contractors for supplies of the necessary articles for the trade of the company in that country; Johannes Mathias Ross, the Dutch governor of Chinsurah, entered into a contract with Henry Halsey, amongst others, for supplying the Dutch factory there with coarse cloths, and advanced to him for that purpose the sum of 23,200*l.* on account. At the time of the surrender of Chinsurah this contract remained unperformed. The other contractors accounted with the English East India Company, and made good their respective contracts. A suit was instituted against Halsey in the Mayor's Court of Calcutta, in Bengal, by the East India Company, in their right as captors of Chinsurah, for the amount of such advances made by Governor Ross, which suit was dismissed with costs in 1783. The company having failed in this action founded on their right as captors, had recourse to another expedient, and procured, through the medium *of [*181] a Mr. Purling, an assignment, executed by Ross, for a trifling consideration, of the amount of the contract, and commenced a suit in equity for its recovery from Halsey, who by a decree of the Supreme Court of Judicature of Fort William, in Bengal, in 1784, was condemned in the said sum and costs. By this decree the company became entitled to receive the amount, and payment was immediately enforced of the greater part by the sheriff's levy on Halsey's property at Calcutta. The first question now for your lordships decision is, shall the amount of this contract be appropriated to the same purposes and distributed in the same proportions as the former

sums of money, part proceeds of this capture. The judge of the High Court of Admiralty has decided in the affirmative, and pronounced the sum of 23,200*l.* now remaining in the registry pursuant to his order, to be part of the proceeds arising from the capture, and directed it to be invested in navy five per cents. until the decision of this court shall be known, without prejudice to the present appeal. In the various arrangements subsequent to the capture of Chinsurah, the East Indian Company have considered themselves authorized by the letters patent granted to the company in 1782, to stand in the place of the British government. The contractors in general acquiesced in this determination of the company, and paid the sums due voluntarily. Mr. Halsey alone contests their right. The company, conceiving it theirs as a droit of war, institute a suit and set forth their claim. How was this claim dealt with? The court were then of opinion that the company had claimed that which did not belong to them by their original charter, nor could not strictly be considered

theirs in pursuance of the letters patent of the 19th September, [* 182] 1782, which gave them only a right to booty and plunder generally. These letters were, it was observed, issued subsequent to the capture. In the report made by their attorney to the company upon the issue of this suit, he observes: the objection to the company's claim, which occasioned judgment to be given against them, was made by the chief justice, and acceded to by Mr. Justice Hyde, (not taken on the part of Mr. Halsey,) and was, "That it was not intended by the letters patent granted to the company to convey debts due from enemies, though the parties might have happened to be made prisoners by their forces; consequently the sum claimed, being a debt in their judgment, did not come within the meaning of the letters patent, which only grants to the honorable company all such booty or plunder, ships, vessels, goods, and merchandises, and other things whatsoever, which since the letters patent of the 19th day of September last, have been or shall be taken or seized from any of the enemies of the company," &c. In either case, therefore, the court were of opinion the company had no right vested in them for the recovery of this property. They, however, do not lose sight of the means for possessing themselves of this as well as other droits of the crown, and appropriating them exclusively to their own advantage, and, therefore, since an application founded upon a right supposed to be derived from his Majesty had failed, they proceed to lay the foundation of a ground of proceeding in a civil way, and obtain through the medium of their agent, Mr. C. Purling, a new title; Purling procuring from Governor Ross an assignment of his claim on Halsey, in consequence of the non-performance of the contract, and

* making himself a fresh assignment of this claim, so derived, [* 183] to the East India Company. The assignment is made by Ross to Purling for the paltry sum of five rupees, and by this artifice the company derives a right to the immense sum of 232,000 rupees. They now stand in the place of Ross, and whatever right he had, appeared to be vested in them. Whatever might hereafter be the opinion entertained of the validity of this assignment, or the right of property at that time vested in Halsey, they considered perfectly immaterial; trusting that should they once become possessed of the property, there would be but little chance of an inquiry being instituted into the means resorted to in obtaining it. The suit was brought in the name of Ross, and judgment given against Halsey, upon which the company proceeded to levy the amount. In the year 1796, the then Procurator-General prayed the judge of the High Court of Admiralty to assign the East India Company to bring into the registry the sum of 23,200*l.*, which, by the report of the registrar, to whom the accounts had been referred, still appeared to be due as part proceeds of the capture. On the part of the company it was then objected, that the sum in question was now the subject of a suit in the High Court of Chancery of Great Britain at the instance of the Dutch East India Company, who disputed the validity of the assignment made by Ross to Purling. The judge directed the question to stand over until the determination of the said suit. In 1808, a similar application was made on the part of his Majesty, by the king's proctor, denying that any suit was then depending between the two East India companies relative to this property, and that even if it were, still the money ought to be paid into the registry with interest from the time it was received * by the company. [* 184] On the part of the company it was alleged, that the suit instituted in his Majesty's High Court of Chancery, on behalf of the Dutch company against the English company, for the recovery of the said sum, was still depending undetermined in that court; that the bill was filed during a time of peace between this country and the States of Holland, and hostilities having shortly afterwards commenced between the said countries, the proceedings in the suit became suspended; during the short interval of peace which followed, and previous to the recommencement of hostilities, by which the Dutch company became again incapable of enforcing any further proceedings, no answer had been obtained; and the English company having been advised by their counsel not to put in an answer to the said bill until compelled thereto, (as also that it would be extremely difficult to set up any legal defence to the claim of the Dutch East India Company,) had not taken any steps to obtain a decree for the

Capture of Chinsurah. 1 Acton.

said bill to be dismissed: and further, that upon cessation of hostilities, the said Dutch East India Company, or their representatives, would be at liberty to pursue their judicial remedy for its recovery. Upon this representation of the parties, the judge decreed the monition to the company to bring the sum in litigation into the registry. This was immediately brought in, and an application made on the part of the company to the court, alleging they had incurred considerable costs in the suit against Halsey, and also in carrying the said decree into execution, amounting to 483*l.* 6*s.* 11*d.*, and had only received in consequence of this decree, part of the amount of the judgment, of which 4,968*l.* 19*s.* still remained unpaid, [*185] praying the said sums might be refunded from *that brought into the registry, particularly as the property had not been adjudged to belong to the crown, but had been recovered by them in the right of Ross, in a transaction of a private nature, and not as agent for the Dutch East India Company, as would appear from the correspondence of Ross and Halsey, annexed to the papers in the cause; and lastly, submitting that the crown was therefore not entitled to any interest on the said sums during the time it was in the hands of the company. This cause was finally heard in the High Court of Admiralty on the 19th May, 1809, when the judge pronounced the sum in the registry to be part of the proceeds of the said capture, and reserved the consideration of deductions therefrom, and of interest and costs: from which the company have thought proper now to appeal. The court has now to decide upon the question, Is the sum at present in the registry to be considered prize, and, as such, subject to be distributed at the pleasure of his Majesty? The court below is also desirous to receive the benefit of your lordship's opinions on the reserved questions of deductions, interest, and costs.

The company have attempted to establish a distinction between the nature of this sum recovered and that recovered upon the other contracts; the others were voluntarily paid in. No question was agitated as to the right of the company, or it would have probably been discovered that the company had no stronger claim to one than the other. Halsey appears to have been aware of the weakness of their case, and the court decides that the company's claim is invalid, and states the reason of its decision; the right of possession must therefore rest with his Majesty. Because they have failed in recovering in their right as captors, it is not to be inferred the claim [*186] *of the crown is thereby affected or weakened. This court has already decided that the former sums obtained on the other contracts are prize. No distinction has been or can be made by the company between this and others; there cannot remain a

doubt that this sum must also be considered part of the proceeds of the capture, and subject to the regulations respecting prize.

It has been suggested by the company, there is a possibility that as a suit has been commenced in the chancery here, between them and the Dutch company, which still continues undetermined, they may yet be compelled to pay this sum into the Dutch company; that is, in other words, as this right between these two companies may by possibility never be decided in the Court of Chancery, the suit between the crown and the English company should never be decided here; although the issue of the former must ultimately depend upon the latter, if such a suit actually depends. But what ground can a Dutch East India company have under the circumstances of this case to support such a right? This alleged suit was commenced in the peace which followed the capture. A new war broke out, to which succeeded the short peace, during which nothing had been done for prosecuting their claim; and the present war commenced. Is it to be supposed that the Dutch company would have abstained from further proceedings, unless they were perfectly aware their case was hopeless? and are the just claims of his Majesty to be set aside *ad infinitum*, under the pretence that a suit is yet pending by which the English company may hereafter be compelled to pay this very sum, when that suit has lain dormant for two intervals of peace, distant from each other several *years. [*187] The East India Company have, no doubt, fed this cause, and that from a conviction of the benefit they so long have been deriving from it. It has been suggested by a very high authority at the chancery bar, that the Dutch East India Company could not stand in a court of equity. In a court of law we cannot recognize them. To sustain an action there, they must bring it in the names of the individuals composing the company; and supposing that they had even done all that was requisite to bring themselves within the protection of a British court of jurisdiction, the suit might nevertheless have been moved to be dismissed after three terms had elapsed without prosecution. What then can be urged in favor of such parties as these, who have continued to uphold their suit for fifteen years to their own advantage? Supposing that recourse has been had to no artifice to keep it alive, the utmost that can be alleged is, the claim of the Dutch company, such as it is, merely remains. There appears something, however, very doubtful and suspicious in the nature of these dilatory pleas, which have from time to time been set up; and hence the court will be the more disposed to decide in favor of a claim urged with all possible candor and fairness, and which has been already too long defeated by the perversion of legal proceedings,

since the English company have all along been permitted to derive advantage from their own wrong.

The question, however, now before the court is, that in which no court of equity can possibly interfere. It may be imagined a bill of interpleader might be instituted in chancery, whereby the two companies might be permitted to plead the right of property, if that property still continued at the disposal of that court. But it is [*188.] *not so ; this is a strict question of prize. In the judgments given on the former appeals, your lordships decided, that sums of money produced in a similar way, by calling contractors to account for money received on account of the Dutch East India Company, were droits of war, and subject to the usual mode of distribution in cases of prize. Whatever litigation might exist with respect to that property, or whatever might be the decision of the Court of Chancery upon such, you would not respect it, as the court was not one of competent jurisdiction to try the real question at issue. In the same manner the property in this case being of a precisely similar nature, your decision should turn merely upon the facts of the capture, the nature of the property, and of the contract between the parties, without any reference to such a suit, if actually in existence, which, if it does exist, is altogether to be imputed to their own negligence in not moving for its dismissal. Nor will this court be disposed to sanction the idea, that a suit in chancery rendered perpetual by the negligence or by the interested views of a party, shall be also a perpetual bar to the just claims of the crown.

On the subject of interest accruing on this sum since the company became the legal possessors of it in right of the judgment against Halsey, it is worthy of observation, in that instance they demanded and recovered the interest arising thereon from Halsey. They obtained it, it is true, by indirect means, but retained it subject to the claim of the crown, and, as they well knew, merely held for the crown *pro tempore*. No grant by charter or patent having ever been made of such property ; this money, so due by Halsey, they recovered [*189] with interest. With what show of justice, then, *can they, receiving it with interest and applying it ever since to their own advantage, call upon the court to refuse the application made on the part of the crown ? It would be, in effect, holding out a premium for injustice to those who hereafter might have equally cogent motives to hold over property, of which they had illegally obtained possession. If the company be not compelled to account for interest, it may prove a strong inducement, in future, to devise means for obtaining possession of money due to the crown as soon, and procrastinate the payment as late as possible ; the interest

accruing in the interval being so much clearly gained. So great has been the anxiety of the company to keep possession of this money by any means, that, when the registrar drew up his report in 1793, they sheltered themselves by asserting that there was then a suit pending respecting it in the East Indies, whereas that suit had been determined, the money recovered, and, for the greater part, levied, in the year 1784. When parties are detected in such artifices as these, to elude the demands of a just claimant, and keep possession of a property to which they are not entitled, they cannot be too strictly dealt with; and as the company is always able to make, at least, the usual interest on money in their possession, they are left without a shadow of excuse for resisting the payment of that interest to the crown.

With equal show of justice they enumerate various sums of money, to which they contend they are entitled, as deductions and allowances from this property. Leaving to the discretion of the court the question whether they are entitled to costs, in an action to which they presumptuously and without right made themselves parties, we must be entitled to the remainder * of the [*190] sum recovered under the judgment, but which Halsey has not since paid. The company have taken upon themselves to act as agents for the crown, without any authority whatever; they are, of course, subjected to all the responsibility which attaches to the situation. For the money they have received they are responsible, as other agents usually are; for that which they have not received they are equally responsible, inasmuch as they might have received it. From 1784, when judgment was obtained, to the time of his death, they might have had execution or process against his goods or person, and it is not disputed that he was perfectly competent at all times to discharge the whole. Nay it even appears, by the memorial of Halsey himself to the governor general, the company were actually in treaty for its payment, and he then offered to pay the whole in bonds of the company long since due, for money advanced by him thereon to the company, only requiring that he might be indemnified from all future claims on this head by any other party. He disclaimed any wish whatever to enter into a dispute or litigation with the company, as it was immaterial to whom he should pay the money, provided he was secured against future demands. This was rejected, and the company preferred a suit at law, when they might have attained their object without it. Shall the crown suffer for their obstinacy in this instance, or for their remissness in not compelling the payment? There must be something mysterious in the conduct they have pursued. If they, acting as agents, have shown

such anxiety to obtain the possession of this property, yet such reluctance to part with it to those for whom and in whose right they received it, there is much reason to suspect they have their private reasons for not enforcing the payment of the residue due [* 191] on the judgment nearly twenty-six * years; and as they have acted the part of unfaithful agents, there can be no ground for the allowances claimed, or for the indulgence sought from the court, except, perhaps, that which has already been granted them in the court below, in lieu of all other charges and costs; namely, an adequate commission per cent. for managment upon the whole sum received as proceeds of this capture.

Adam and Swabey, for the appellant. The extraordinary delay which has attended the proceedings of the company in recovering this money, has been occasioned by the necessity of examining witnesses at considerable distances from the seat of justice. The company have endeavored to give every facility to the prosecution of this cause, and the courts have uniformly desired the suit to be staid until the *lis pendens* should be concluded. Hostilities between Great Britain and Holland still continue. The natural consequence is, the Dutch Company's claim, of course, is dormant, not extinct. If the High Court of Admiralty can now cut the difficult knot, it may be fairly asked, why was it not long since effected? The objection which formerly had such weight with the court continued, and still continues in full force. So cautious was the court of proceeding in this cause, that, for a considerable time, no other order was issued than that for bringing the property into the registry, and finally for its investment in the funds. The parties have no right to accuse each other of laches. If it was the duty of the company to bring all the contractors to account, it was equally the duty of the crown to exhibit its claim and enforce payment from the company.

Equal culpability attaches to both parties. Doubts are [* 192] said to be entertained whether the Dutch * Company can avail itself in this country of any right or claim it may have on this property in its corporate capacity. If it were so, the company would be peculiarly unfortunate to be excluded from redress by a defect in the letter of the law, when the spirit and general tenor of British jurisprudence has been so long extolled, even by foreigners, for its liberality with regard to the property and rights of foreign merchants. But they are not precluded by the letter of the law from enforcing their claims; and, in support of this assertion, the case of *The Osterrever* is particularly applicable. This was a proceeding held in the Court of Exchequer, where the Dutch

East India Company was publicly recognized, the case decided, and no objection made to that company of merchants appearing in their corporate capacity. This authority is decisive, as to the possibility of their setting up a claim to this property and recovering at a future period of peace. If a proceeding could with propriety be instituted, under such circumstances, in a court of equity, the answer would be, — The Dutch Company are now, it is true, by war precluded, but they may yet appear in peace. This might, therefore, have to be paid over by the same parties. It is attempted to show that, as the court below has decided this property to be prize, and this court has determined the same with respect to sums arising from similar contracts, a court of equity could not be admitted to dispose of this as it might were it only private property. No such consequence can be fairly drawn. We cannot recollect any principle which would prevent the English Company being desired, by a decree of a court of equity, to pay this money, if an interval of peace should arrive. Hence the *lis pendens* has equal weight at present as when first pleaded in bar to this demand.

* As to the nature of the property, it is quite obvious this [*193] cannot be prize. The law of prize operates only on the bulk of property, not upon *choses in action* and mere rights yet to be ascertained. If it embrace those due to the Dutch Company, in their deputed capacity as governors of an enemy's colony, it certainly does not extend to debts due to a private person, though an enemy. If the former sums due on contracts were decided in this court to be prize, it must have been from a conviction that they were debts due to the Dutch state, or else no such judgments would have been made in the years 1793 and 1795. The judgments given here upon the appeals from those decrees, with respect to other sums claimed by the company in their right as captors, do not enforce the opinion which Wroughton says, in his letter to the company, prevailed in the mind of the court at Calcutta in the first action. That ground of litigation was not then advanced. The judgments only pronounced the court below was justified, first, in directing a more satisfactory account by the company; and, secondly, by determining certain sums were part proceeds of the capture, and, therefore, subject to be distributed as prize to the forces engaged. When, however, the judge below called for the assignment made by Ross to Purling, the original could not be found; and, to explain the transaction, various papers of correspondence were introduced, which altogether changed the nature of the case. In these letters Halsey writes to Ross to state explicitly in what capacity he considered the engagement had been entered into by him; whether as governor, and

acting for the Dutch Company, or by him as a private individual.

The answers are as explicit as required : — “ I consider the [*194] dealings between us as those between private *merchants only, and no more.” Both, then, consider themselves as transacting business on their own account; and Halsey, in his memorial, anxiously requests the matter may be concluded, on his paying the money and receiving a release. The cause, however, comes on, and the property is decided on as private property merely, or rather a *chose in action* between private individuals, and therefore not subject to the law of prize.

If the company be now directed to pay the amount with interest, a future application to a court of equity will, perhaps, obtain a decree, whereby the company may be compellable to pay it and interest over again to the Dutch Company, or to Ross; for in one or other of these parties the right of property must lie. The judge below decided that no interest should be granted on those sums which have long since been decided to be lawful prize; and no appeal was ever made from that decision. Here a doubt has been entertained respecting the nature of the property, and the agent of the crown has for a long time apparently neglected to enforce its right; the court will therefore not be extremely anxious to give that party interest which has accrued in consequence of its own negligence. The sum yet due from Halsey should be at all events deducted; since there appears to have been no inattention on the part of the company in carrying the judgment into execution. In the memorial of Halsey, he alleges great difficulty arose in obtaining money in India, except through the instrumentality of the company. This may furnish a reason for the delay in the payment of the residue. In addition to this sum the court will, no doubt, add the ten per cent. for management upon the gross amount, which has been granted below in lieu of all other charges.

[*195] **The King's Advocate*, in reply. The inconsistency of appealing to the forbearance of the court after near thirty years' illegal possession of the property is too obvious and glaring. If I understand the rule of an equity court aright, the bill which is to prove the great barrier to justice if unprosecuted for three terms might have been moved to be dismissed. Why have not these self-constituted agents of the crown, therefore, done their duty? Referring to general principles of the law of nations, there exists no bar to your concluding this property to be of the same nature as the former sums disposed of as prize. It has been said, prize consists of property in bulk. In the way in which this has been argued it

is impossible to accede to it. Referring to the utmost rights of states to avail themselves of conquests made, our right is self-evident as conquerors; possession may be taken of every thing which is the property of the subjugated state, or might have been converted into property by it. If the victors obtain possession of a bond, what can prevent them from enforcing the payment of it from any individual? No distinction can be shown between the nature of this property and that already decided upon several years past. The judgment of both courts of prize appear sufficient to bear out this inference, that the company was accountable for those sums due on the other contracts as *choses in action*. A query has been suggested, whether a private *chose in action* would be in strictness prize. Reverting to first principles it would appear so. The relaxation of the rigid rules of conquest may probably constitute exceptions. But the proof that this property is of a private nature has altogether been deficient. Shall an *ex parte* correspondence, over which we can have no control, and a memorial of Halsey an interested person, neither of which were introduced until the year 1796, be *permitted to [*196] change the case so materially, and shall it be now introduced for the purpose of proving that Halsey acceded to the payment upon condition, though it was his interest to have contested the assignment as altogether invalid? Duplicity and artifice pervades the whole transaction. Purling, the trustee, is also a public commissioner. Thus it is a payment privately for the commissioner's use publicly. Accounts, it appears, have been also kept by which it appears the company have paid off *choses in action* to neutrals, whilst they resist the just right of the crown.

Our claim to interest is disputed merely because it has not sooner been demanded. The crown has throughout the transaction been too indulgent. A demand is now made only for interest on part of the proceeds. If both parties are culpable for negligence, we should, on common principles of equity, be entitled to half the beneficial consequences; that is, half the interest. Our neglect has been favorable to them, but it arose from credulity, believing the company would take no unhandsome advantage of the indulgence afforded by the officers of the crown. It will, however, be a wholesome warning to us in future to look with jealousy upon their conduct where their duty and their interest may be placed in competition.

The court will no doubt see the injustice of demanding by a sweeping charge of ten per cent. for management. Let them specify distinctly the expenses to which in this particular instance they have been put by enforcing the crown's right; if they act as agents, as agents they should account. The agency is still imperfect, and they

as agents should complete the recovery of the property taken into their charge before any claim can be admitted for deductions; [*197] and if the accounts be again referred to the registrar *we hope the company will be directed to account for the sum of 26,530*l.*, the amount recovered under the judgment, also specifically for all sums received and all charges and deductions demanded.

The Court took time to deliberate.

JUDGMENT.

February 1, 1810. SIR W. GRANT. The only doubt which arose in our minds with respect to the claims of these parties was, whether the 23,200*l.* the sum in the possession of the company previous to the breaking out of a fresh war, was subject to a similar order as had been already made with respect to the sums received upon the other contracts. Whether the Dutch East India Company can avail themselves of their claim in our courts here we are not called upon to determine. The suit it seems was not commenced by them until ten years after peace had been concluded. The recommencement of hostilities prevented its being prosecuted for a time. Peace is restored, yet no further proceedings are had by any party until the present war again obstructs the prosecution of such a suit. We are now decidedly of opinion there can be no question how the matter should be decided as between the crown and the English East India Company. No difference exists between the grounds of their claim to this and to the former sums. The papers exhibited in the court below in 1809 do not state that the company had derived a new title to this property, and that a new case had been made out from these papers. Their great object appears to have been, the deductions and allowances for specific sums out of the total. The assignment was only obtained in aid of their former title. Purling acts [*198] merely as their agent; the *consideration given, though denominated valuable, is obviously nominal and trifling in comparison of the sum to which the claim is thereby intended to be derived. The contracts are precisely of the same nature and for the same sort of consideration.

Throughout the whole transaction it is distinctly proved the company interpose themselves as trustees for the crown merely, and must be accountable in like manner for this as for other sums received. The sentence of the court below must, therefore, be affirmed.

This sentence contains a reference to a subject of interest and costs. We are now requested by the parties to give an opinion upon these respective claims. In 1796 an application was made for inte-

Capture of Chinsurah. 1 Acton.

rest upon the gross sum arising from the proceeds of this capture and the costs of the proceedings in that cause which was rejected. From that period we are of opinion the company should account for interest at the rate of 5l. per cent. upon this particular sum. There can be little doubt that if the facts disclosed in the paper submitted in this cause in 1809¹ to the court below had been known in 1796, an order would have been made for the company to deposit the sum in court. On the equitable principles, therefore, the crown is entitled to the interest accruing since that time. The question of deductions must be again referred to the registrar and merchants, and in deciding how far the company is *entitled, attention [*199] should be paid to the complaint made by the crown's advocate, that there has not been due diligence shown in the prosecution of its interests. No costs can be allowed, as this is at the suit of the crown.

SENTENCE.

The Court pronounced against the appeal, affirmed the sentence appealed from, and retained the principal cause, and directed the appellant to pay interest at five per cent. upon the sum remaining in the registry from the 8th of June, 1796, until the time of its being paid into the registry, and referred the deductions from the said sum claimed by the company to the registrar and merchants to report thereon.

February 24, 1810. The registrar reported that the amount of the demand of the company against the estate of Halsey, as appeared by referring to the decree of the Supreme Court, exceeded the sum brought into the registry, 5,236l., from which sum, deducting law charges, additional costs of execution, and a commission to the company of 5 per cent. on the total amount to 1,905l., a surplus of 3,331l. still remaining due from the estate of Halsey.

For the crown. It was argued that the crown was entitled to recover this surplus with interest thereon from 1796 in the same manner as upon that already brought into the registry.

¹ The assignment from Mr. Purling to the East India Company, by which the company became entitled to recover in right of the former assignment executed by Ross to Purling. Ross's original assignment was recited in that made to the company, but could not be produced. An affidavit was introduced to prove that neither the assignment nor any copy of it had been transmitted to the auditor's office at the India House.

JUDGMENT.

SIR W. GRANT. The specific sum of 23,200*l.* was both in this and the court below the subject upon which a decision has been obtained, and we supposed it was assumed by both parties as the only sum upon which both as to principal and interest since 1796 any [*200] *question arose. The report now presented differs however in point of form from the decree. When deductions were claimed by the company, we thought it not improper to order their accounts should be inspected. For although the sum brought into the registry was that alone which with interest had been claimed, as nothing was satisfactorily known of the account between the company and Halsey, it might hereafter prove that more was owing on this account to the company than had yet been acknowledged. It would then have been extremely unreasonable that they should be permitted to claim deductions on the smaller sum when probably an excess remained in their hands, or it was in their power to enforce its payment. The report as it stands is not strictly warranted by the decree; for it proceeds further and calculates interest and deductions as on the larger sum. The company, however, appears to be more than compensated by the excess of the sum which was recovered on the judgment, for the expense attending the agency for the crown. We, therefore, strike off the items of expenses and charges demanded, and consider the matter as nearly equitably adjusted between the parties; the company allowing on the one hand for some things they have not received, and on the other being permitted to remain in possession of an excess for which they have not been hitherto called regularly to account. And here we are of opinion the matter should rest.

FINAL SENTENCE.

Their lordships directed the registrar to amend his report accordingly, which was immediately done, and their lordships confirmed the same so amended, and pronounced that 14,886*l.* was due from the company as interest upon the sum in the registry, and assigned their syndic to bring it into the registry; and the same [*201] *being brought, their lordships dismissed the company and their syndic from the cause, and from further observance of justice therein, and finally rejected the petition of his Majesty's proctor for a monition against the company to bring into the registry the sum of 3,331*l.* mentioned in the said report.

The Charlotte. 1 Acton.

THE CHARLOTTE, Stromsten, master.

January 25, 1810.

A Swedish ship, laden with tar, pitch, and deals, sailing under instructions to take British convoy for Lisbon, in case the master should not be able to obtain a purchaser at Copenhagen for the ship and cargo, but afterwards detected entering a Dutch port, liable to condemnation with her cargo, notwithstanding the protest of the master, alleging the impossibility of obtaining convoy, and that the deviation was occasioned by his apprehension of capture by French cruisers. All favorable construction with respect to the general trade of Sweden in these articles removed by suspicious circumstances in the case.

AN appeal from the sentence of the High Court of Admiralty, condemning this vessel with a cargo consisting of tar, pitch, and deals, the property of a Swedish subject, ostensibly bound for Lisbon, but captured in attempting to enter a port of Holland.

The *King's Advocate*, for the captor, stated, that upon the principle so decidedly adopted by the court below in the case of *The Franklin*,¹ from which sentence an appeal having been since prosecuted, the sentence had been affirmed, and the appellant condemned in the costs of the appeal, there could be no justifiable ground of appeal in the present case; he therefore hoped the court would punish the obstinacy of this appeal by the condemnation in costs.

Jenner and *Stephen*, for the claimant, distinguished this case from that of *The Franklin*, in which there was reasonable ground to suspect the master of an intentional fraud. Here no such intention could be imputed. The circumstances of this case were peculiarly favorable to the claim. This vessel proceeded upon her voyage subsequent to the permission granted by the king of Sweden, our ally, to his subjects to trade with the Dutch ports in innocent articles. In consequence of this permission an order of council issued "on the 31st July, 1807, whereby our cruising vessels were [* 202] enjoined "not to seize or detain the property of the subjects of our ally, the king of Sweden, (not being naval or military stores,) on account of so trading," and further directing the different judges of prize courts "forthwith to release property, not being naval and military stores, belonging to Swedish subjects, which has been, or

¹ Rob. Rep. vol. iii. p. 217.

The Charlotte. 1 Acton.

shall be, detained on account of being engaged in a trade with the Dutch ports." Admitting, therefore, that the original design of the voyage was for Holland, as the vessel sailed the 12th of August following, and could not, therefore, be in time apprised of the restrictive clause in this order, she was entitled to take the permission given by his Swedish Majesty in its liberal construction, and consider this cargo, which was entirely the produce of Sweden, to be altogether or for the most part included in the general terms "innocent articles." The original design of the voyage was from Wasa to Lisbon, but the master had instructions to dispose of this vessel or cargo if he could obtain a purchaser at Copenhagen, where he was to touch for the purpose of obtaining a British convoy for Lisbon; he had repeatedly sailed under similar protection to avoid capture, as he states, by French privateers. The protest of the master, which was corroborated by the evidence of two seamen on board, detailed the circumstances under which he was induced to make this deviation from his original intention. It stated, that on arriving in Copenhagen roads he found no convoy was then appointed, and, therefore, put into Landscrona for the safety of his ship. On the 10th of September The Falcon was appointed, and he went on board her to obtain instructions, which were refused, as his vessel was not then in the roads. On the 17th the convoy sailed. Contrary winds [* 203] * detained him in Landscrona until the 18th, when he set out in company with several British ships, carrying a heavy press of sail, to overtake the convoy. These vessels parting company, and the wind coming round to the west, he despaired of overtaking the convoy or fetching a British port, and being apprehensive of capture by French privateers, he determined to make the first port he could in Holland, which the owner had instructed him to do should he be unable to join convoy, lest he should be captured by the enemy. These circumstances were amply sufficient to justify his entering the Dutch port. Had the intention of the voyage been direct to Holland it would have been legalized by his sovereign's permission. Admitting what had hitherto been a matter of considerable doubt, that these articles, the native growth of the exporting country, were not innocent articles, nor intended to be included within that description, still they alone would be subject to condemnation. This would be the fair measure of justice. Such had been the practice of the court below in several cases. This was not a case of contraband, strictly speaking. In *The Neptunus*¹ the learned judge of the court

¹ Rob. Rep. vol. vi. 403.

below after observing, that by the modern practice of warfare frequently cases of particular relaxations had occurred, adds, "that Swedish vessels were permitted to go into French ports with permitted goods, and this country had acquiesced in that indulgence." Thus it was not very singular the Swedish subject should be liable to error, when the practice differed so materially from received and long established principles. If the importation of these goods was not only illegal but known by the master to be so, then condemnation would undoubtedly be fair. And the learned judge proceeded to state, referring to the order of council alluded to, "this class of cases [*204] is not to be decided, strictly, on the general principle of contraband. I shall not apply the principle of contraband to the ship." If the representation of the master and sailors by the protest were true, then both ship and cargo should be restored, as the only reason for which the vessel could be liable to seizure would be for the purpose of preëmption with respect to the exceptionable part of the cargo. Considering this as a voyage antecedent to notice, it would only be just that the court, acting in conformity to the less rigid spirit which appeared to predominate in the judgment alluded to, should in this particular case decree restoration of the ship and the value of the goods.

The *King's Advocate*, in reply, observed, that each case in which restoration had been made of the remaining parts of the cargo had been characterized by the utmost fairness. Where even innocent articles might appear to have been sent with a fraudulent design or suspicious conduct, it should tend to remove all favorable construction. Had the deviations of the master been the result of necessity? What proof existed of the master's intention to take convoy? It rested on mere assertion. No reliance could be had on such testimony. The voyage originated in intended fraud; for the party must be aware the Swedish treaties at the utmost only subjected their permissive trade to a very severe right of preëmption. The case was, strictly speaking, a case of contraband with false papers.

SENTENCE.

The court pronounced against the appeal, affirmed the sentence appealed from condemning the ship and cargo as lawful prize, and condemned the appellant in the costs of the appeal.

[* 205]

* THE ORION, Petersen, master.

February 3, 1810.

Further proof inadmissible where a party representing a cargo as Danish to evade the belligerent right of an ally, has by such a representation subjected it to be condemned as a droit to the crown, more especially if such representation tends to defeat our own belligerent rights. No permission given to the party to disprove their former allegation as to property.¹

THIS was an application made to the court to reverse the sentence of condemnation pronounced by the judge of the High Court of Admiralty upon the cargo of this vessel, for the purpose of admitting further proof of the property.

King's Advocate and the *Attorney-General*, for the crown. This vessel, sailing under Danish colors, in the prosecution of a voyage from Archangel to Leghorn, was captured on the 10th October, 1807, by the privateer Young Phœnix; his Majesty's Procurator-General intervened for the interest of his Majesty, and the ship and cargo were condemned as the property of Danish subjects, taken prior to the declaration of hostilities, and a droit of war. The papers introduced in this cause are all admitted to be false. The most systematic perjury has been had recourse to for the purpose of concealing, as it is alleged, the real proprietors of the cargo, who are now attempted to be proved, not Danes, but merchants of Lubeck. That which prompted this false representation is stated to be an apprehension entertained on the part of these Lubeck merchants that affairs were rather in a critical situation between Sweden and the city of Lubeck in consequence of the recent occupation of that city by the French, and the seizure of all Swedish vessels in that port. They were, therefore, afraid lest the Swedish nation should be induced to retaliate upon their trade the injuries which the Swedish merchants had sustained in their harbor. If such were the nature of [* 206] * the fraud and the motives which produced it, certainly it might lose some of its culpability in our courts of prize, although it would not even here be proper to relax the old rule for constructing falsehood and perjury unfavorable to a claim in every stage. The account which has been given of the transaction by Mr. George Meyer, merchant of London, and claimant for the house of

¹ [1 C. Rob. 322, The Welvaart.]

Messrs. Croll & Son, of Lubeck, states, that he believes the cargo was, and is, really and *bona fide* the sole and exclusive property of Messrs. J. M. Croll & Son, of Lubeck, merchants, who formed the plan of the said voyage so long since as December, 1806, when they ordered part of the goods to be purchased by Messrs. Brust & Co., their agents at Archangel; they subsequently ordered the remainder, and in May, 1807, chartered the ship Orion, then lying at Hamburg, to proceed to Archangel, and there take on board the said cargo for their account, and in their name, and to proceed therewith to Leghorn; but the French having, upon their entrance into Lubeck, seized all the Swedish ships in that port, and apprehensions being entertained of further encroachments from the French, and that the Swedish government would retaliate upon the Lubeckers, Croll & Son thought it necessary to ship the cargo under a borrowed name, and agreed with Cornelius de Vos, of Altona, a port then at peace with all the belligerents, for putting the cargo under his name; the said charter-party was thereupon annulled, a new one made with the master, as if the affreightment were for account of Vos, and the cargo was shipped ostensibly for his account, but remained actually, and *bona fide* the property of the said Messrs. J. M. Croll & Son.

* He adds, it was never in the contemplation of the said [*207] Messrs J. M. Croll & Son that this property in its real Lubeck character, would be exposed to danger should the vessel be detained by British cruisers; for, although the French had forced the merchants of Lubeck to deliver up all English goods and manufactures, yet the principal houses at Lubeck, and the claimants amongst others, had actually paid their debts to the British subjects, and a secret committee was established at Lubeck for liquidating the whole; and the shipment of the cargo, under a borrowed name, as already mentioned, was not done to infringe or evade the rights of Great Britain as a belligerent state.

For the authenticity of this account, we must rely exclusively on the belief of this British merchant, who has no better means of ascertaining its truth than the representations made to him from distant and interested persons. Perhaps, if the further proofs were introduced, the court would be reduced to the alternative of deciding the case upon the question, whether Voss, who has already committed perjury by deposing to this property as his own, in his former evidence, should be entitled to any credit in the evidence he may hereafter give in support of this claim? His testimony must be directly in opposition to his former depositions respecting the property of this cargo. Nor will the court be inclined to permit a claimant, who has already improved upon the falsehood of this perjured person, to take advantage

of his future testimony, which must be, at least, equally liable to imputation. Indeed, there can be no confidence reposed in any of the parties concerned, since there is strong reason to suspect that they must all have connived, at least, if not actually assisted in carrying this fraud into execution. No arguments, therefore, for the introduction of additional proof are admissible.

[*208] *As the case stood, the admissions of the claimant are decisive in favor of the right of his Majesty. The Swedish nation being then the allies of Great Britain, it was also her duty to support Swedish rights. The claimants confess an intention to defraud the rights of Sweden in the event of capture. It is remarkable, however, that this fraud continues to be acted upon even after the vessel had passed the sound, when all danger of capture by Swedish vessels might be considered nearly at an end; as the danger was merely local, and confined to her navigation in that part of the Baltic which encompasses the southern part of Sweden. Why were not these false representations abandoned, and fair descriptions of cargo resumed as soon as the apprehensions entertained might be considered fairly at an end? The only rational answer to such a query is, that these misrepresentations were actually adopted with a further view to defeat British belligerent rights, and continued with that intention. Under the Danish flag, at that time, the vessel might proceed through British cruisers in safety. Whilst the ships of Prussia, and of Lubeck, were subject to great restrictions in their trade, imposed by his Majesty's orders in council, about that time, first subjecting them to capture, and subsequently¹ permitting Lubeckers to trade between neutral ports. The danger of seizure by Swedish cruisers was, therefore, not the only motive for trading under Danish sanction, since equal danger was to be apprehended from British cruisers, as this vessel was prosecuting a voyage prohibited at that time, by an order of his Britannic Majesty in council, under which he would have been liable to condemnation.

[*209] **Adams and Stephen*, for the claimants. When the distressing state to which the city of Lubeck has been reduced by the cruel policy and restrictive decrees of France is considered, the court will probably be induced to relax the strict measure of justice in favor of these unhappy people, especially where it is a question between the Lubeckers and the crown. That false papers are to be

¹ See instructions of the 18th February, and orders of the 25th November and 10th December, 1807.

taken strongly against claimants requesting permission to introduce further proofs, must be admitted generally. But such has been the change which has taken place in the mercantile transactions of nations at the present day, that on the continent, a considerable part of the import and export trade is carried on through the medium and by the assistance of misrepresentation and false documents, in the same manner as we now obtain Russian cargoes here. So generally has this practice prevailed, that even the authorities themselves have been induced to facilitate the system by granting certificates of affidavits relating to such property, when, in fact, no such affidavits have ever been sworn to. Hence it does not necessarily follow, that should the court be disposed to admit the proofs required, (of which a list is enumerated in the papers of the cause,) it would have to decide upon the degrees of credibility to be attached to the former oath of Voss, or that which he might perhaps now take to disprove it. Probably he had not made any previous asseveration in order to obtain that certificate. In a moral point of view certainly, applications of this nature cannot be sufficiently discouraged. No indulgence should be granted to a party making a false oath for a fraudulent purpose. But such is not the view this court will be disposed to take of this transaction. It will consider it distinctly as a question * of national [*210] relation between those countries whose rights, either absolute or assumed, may be evaded by the course pursued. How far the fraud may be justified by circumstances, is the only question that remains for the decision of the court. In the argument adduced on the opposite side, it has been conceded, that should the deceit be discovered not to militate against British rights, either in act or intention, that it would not be here considered so reprehensible. This was abandoning the morality of the case altogether, and conceding that it was to be decided merely in reference to its political effects. If even it should appear the rights of our ally, the king of Sweden, have been attempted to be violated, it will be discovered to be merely a consequence of the unhappy situation into which these unoffending neutral merchants have been driven by the intrusion of the enemy. If the further proof shall be considered admissible, the claimant proposes to introduce, not his own attestation or that of Voss, both of which might be objected to, but that of disinterested persons. He must, and unquestionably ought to prove, that the mask has been assumed solely for the pleaded purpose. The claimants appear certainly in *misericordia*, and solicit an indulgence which under no other circumstances they could expect to obtain. But when there appears so much fidelity, punctuality, and strict neutrality in the conduct of the merchants of Lubeck in trade with, and relation to this country,

notwithstanding the possible danger which might result from pursuing a line of conduct so directly in opposition to the views of the enemy. When the extreme embarrassments and difficulty which obstruct their remaining trade are recollected, the court will probably relax the strict rule of law, and permit these further proofs to be introduced.

[*211] *JUDGMENT.

SIR WILLIAM GRANT. Is there no precedent in the recollection of counsel for such an extension of indulgence? We ourselves are not aware of any. The whole seems to have been assumed as a mask to deceive either Swedish or British cruisers, and not at all for the purpose of obviating any danger to be apprehended from France. We cannot, therefore, permit a party to introduce additional proof with respect to a transaction evidently calculated to defraud our belligerent rights or those of our ally.

Pronounced against the appeal.

LE BON ADVENTURE, Lamoriniere, master.¹

February 24, 1810.

Asserted joint capture on the part of an associated squadron. *Onus probandi* altogether rests with the party setting up the claim.

In the absence of other evidence, the ship's logs introduced: referred to the Trinity Masters.

To impeach their decision, necessary to point out obvious neglect; since they must be considered the best judges of such evidence.

The general presumption that the actual captor did his duty in making signals when they could be made with effect, &c. Necessary to remove it by positive evidence.

An appeal was prosecuted in this cause from the sentence of the High Court of Admiralty, pronouncing against the interest of the fleet, with which the actual captor had been associated at the time, the capture appearing to have been made out of sight of the fleet by his Majesty's ship *Albion*, and in sight of *The Naiad*, one of the vessels composing the said squadron, but which had parted from the main body the evening before, for the purpose of proceeding to Plymouth with two prizes in company. The claim of *The Naiad*, to

¹ [For cases as to joint captures, see *The Nordstern*, 1 Acton, 128, note.]

share as joint captor, was, therefore, admitted in the court below, where, in order to obtain a more early decision of the cause, Captain Ferrier, of The Albion, being then in the East Indies, and his return uncertain, his answers to the allegations on the [*212] part of the fleet were waived by consent, on certain facts pleaded being admitted by his proctor on his behalf, a minute of which was filed 20th March, 1807, whereby the king's proctor admitted, that a strange sail appearing, The Albion chased from the fleet by signal, and having captured La Petronelle in sight of the fleet, went in chase of the prize in question without any further communication, or receiving any further signal for that purpose.

Dallas, for actual captors respondents. The allegations of the asserted joint captors in the court below, consisted of several articles, of which Captain Wallis of The Naiad, in the absence of Captain Ferrier, admitted only the three first, pleading certain general regulations, namely: 1st. That when several of his Majesty's ships are associated together and form a fleet or squadron under the immediate direction, orders, and control of any rear-admiral, vice-admiral, or admiral, commodore, or other commander, it is an uniform and positive regulation in the British navy, that no ship attached to or belonging to such fleet or squadron is permitted, on any pretence whatever, (wind and weather excepted,) to part company from or go out of sight of such fleet or squadron, without first obtaining or receiving orders for that purpose, by signal or otherwise, from the admiral or commander-in-chief thereof; and that it is the positive and bounden duty of every captain or commander of a ship, attached thereto, to adhere strictly to this regulation. 2d. That when a fleet or squadron of British ships are cruising together on any service, which may, on an emergency, require the joint coöperation of the whole, it is a regulation in the * service, that during the course of the night they keep as [*213] close to each other as the order of sailing and other circumstances will admit; and at daybreak in the morning the several ships composing it are usually directed, by signal from the commander-in-chief, to spread themselves in various directions, so as to occupy a larger space, and thereby the more effectually look out for and annoy the enemy; and they are at perfect liberty to examine all strange sails passing near or through the fleet, provided only that they can do so without the risk of parting company; and every commander of a ship which discovers a strange sail is bound to make the same known, by signal, to the admiral, and to receive his directions previous to proceeding in chase; and if any of the said ships should, from unavoidable necessity, part company without any order for that

purpose, they are to use every endeavor to join the fleet as expeditiously as possible.

In addition to these articles, the actual captors admit the several vessels now claiming as joint captors, together with *The Albion* and *Naiad*, composing the cruising fleet off Brest, in May, 1803, under Admiral Cornwallis, commander-in-chief, under orders from the admiralty to observe the movements of a French squadron then nearly ready for sea; also to prevent supplies reaching that port, and to intercept certain French ships of war then returning from the West Indies. On the 5th June, 1803, Captain Ferrier, being on the lookout, discovered a sail in the north-west quarter, steering north-east by north, to which he gave chase. Whilst in chase, about half-past eight o'clock, the remainder of the fleet bore up by signal, and made all sail to the south-east and by south, in order to reach their position off Brest. At half-past nine he boarded the chase, [*214] which *proved *The Petronelle*, French brig. The two vessels lay to, with their heads N. N. E., for about two hours, which was spent in securing the prize. About half-past twelve another sail hove in sight, at the distance of five or six leagues in the north-east quarter, and soon after three sail more appeared, still more to the eastward. Chase was given by *The Albion* to the former, during which, about two o'clock, she completely lost sight of the fleet, which was then steering south-east by south for Ushant, sailing at four or five knots per hour. Having run nearly forty miles to the north-east in chase of the said vessel, he captured her in sight of the three other sail mentioned, which were *The Naiad* and her two prizes. This vessel proved to be *Le Bon Adventure*, French merchant vessel, and the prize now in question. It is distinctly denied by the actual captors that any assistance could have been procured from the fleet, had it been required; as they were out of the limits of signal distance during the whole chase, and completely out of sight after two o'clock. Nor was the fleet at any time nearer the said prize than twelve leagues, even when first seen by *The Albion*; which rendered it impossible for her (a merchant ship) to be seen by the fleet, more particularly as the day was cloudy. The fleet steering south-east and by south, and the prize steering due north-east, the fleet and prize continually increased their distance from each other, which, at the capture, had increased to at least twenty leagues. Upon the facts of this case the evidence is frequently contradictory; indeed few of the most material are admitted by both parties to have taken place in the same manner. Upon the respective distances of

The Albion and the prize from the fleet, a diversity of opinion prevails. It is, however, admitted *by all parties *The*

Le Bon Adventure. 1 Acton.

Albion separated in the morning, in consequence of a signal communicated to her from the commander of the fleet. The duty enjoined was the chase of *La Petronelle*. The order was complied with and the duty fulfilled as soon as the prize was boarded. It does not appear that, after this first chase, any signal was made by the commander of the fleet; or that a signal might have been made respecting this last vessel, (*Le Bon Adventure*), by Captain Ferrier to the admiral, but was not made. This is of material importance in the cause. This chase cannot possibly be referred to the first order, which had one specific object alone. Here even the case for the asserted joint captors must fail; since, if out of signal distance at the commencement of the chase, or if within signal distance and no signal was made by the fleet to him, or by him to the commander, respecting this particular vessel, and afterwards the vessel was overtaken out of all reach of assistance from the fleet, in neither case could such a capture enure to the benefit of the fleet. The title to share in this instance, on the part of the fleet, is made first through a supposed performance of duty, when it rests upon the presumption that *The Albion* only performed this latter service as part of the duty enjoined by the signal to chase *La Petronelle*. And again made on a supposed breach of duty, when it is said that, as he neglected to make signal before he proceeded in chase of the ship now in question, the neglect must enure to the benefit of his associates, as much as if he had made such signal and received orders to chase. This latter is contained in the second reason in the case for the appellants, notwithstanding that it is positively stated, in their original allegation, that Captain Ferrier did, *in [*216] virtue of the first signal, chase this prize, without considering himself as violating any of the general regulations of the service, recited in the two first articles of the said allegation.¹ The reasons annexed to the case of the appellants are three. The first rests on the fact of sight by the whole fleet, on which a right to share is founded. The second raises a new title by impeachment; and states that, because at the time *The Albion* went in chase of the prize in question she was within signal distance of the fleet, and of which she continued to form a part, it was the absolute duty of her commander to have communicated with the admiral commanding the squadron before he so went in chase, and the omission thereof cannot divest the fleet of the right to share, and entitle *The Albion* to the sole benefit. The third affords another objection, founded on the

¹ *Vide supra.*

insufficiency of the evidence produced in the High Court of Admiralty; because the entries in the various logs, which formed the principal ground of decision on the question of sight in the court below, are so manifestly inconsistent and contradictory, no reliance can be placed upon them, in opposition to the positive testimony produced on the part of the fleet.

In that court the first title raised, that of sight, has been decided principally upon the strength of that evidence, to which an exception is made in the last reason adduced. This question applies to three periods; the commencement of the chase, any intermediate part, and its conclusion. If there appear a contrariety of evidence between the actual witnesses and logs, it still must be considered a nautical question, into which the court below would not go, but referred it to the examination of the gentlemen of the Trinity House. The [* 217] high professional character of those gentlemen renders their evidence, in all matters of this nature, most desirable and unexceptionable. They have considered it impossible, on a review of the logs of the fleet and actual captors, that the prize should have been seen by the fleet during the chase. The court acceded to that opinion, as will, probably, your lordships. On the second reason it will be proper to inquire, can such a breach of duty as that imputed operate so as to divest the fleet of its ordinary right to share in conjoint enterprises? Will it enable the actual captor to set up an exclusive title? It does not appear there is any rule of law existing that determines a breach of duty will entitle the commander, under whom the officer thus guilty of a breach of duty acts, to share in the same manner as though he had performed his duty. In the case of *Harvey v. Cooke*,¹ where it appeared that Captain Milne had deserted his station without orders, and undertaken an enterprise out of the limits of his instructions, it was held that the admiral's claim to share in a capture growing out of this disobedience was invalid; inasmuch as it could no longer be supposed that any constructive assistance and direction was afforded, or could have been afforded by the admiral, upon which alone his claim to share could have been founded; and the opinion of Mr. Justice Le Blanc turned more emphatically upon the policy of coming to such a decision for the general interests of the fleet. The same principle is sanctioned by the judgment pronounced in the case of *The Robert*.² Upon this part of the case our inquiry should be directed to ascertain, not whether the fleet and the actual captor were in sight of each other, but whether

¹ 6 East, 220.² 3 Rob. 194.

they were within signal distance during the chase, assuming (what is by no means granted) that it was his duty to have made a fresh signal; for although it might have been eligible, in the opinion of the admiral, *to order The Albion to give chase [*218] in the morning, circumstances might have rendered it ineligible after twelve o'clock of that day; yet if no signal could be made with effect, its omission by Captain Ferrier was not a breach of duty, but merely the result of a conviction, on the part of Captain Ferrier, of its inutility. Upon this fact, where is the preponderance of evidence? Two persons on board The Ardent — one a midshipman, Essel, the other, Captain Bell, of marines — say, from the position of The Ardent, signals might have been made to her by The Albion, and repeated to the fleet. This evidence is not only suspicious, as coming from releasing witnesses, but it is remarkably singular that the evidence of sight by the fleet rests upon the testimony of two persons whom it is natural to suppose would be the least likely to have taken accurate notice of such an event, from their situations and occupations on board. The master of the prize states he was captured by The Albion, in sight of three British frigates. In this, however, he is not borne out by his own second captain, who only states the capture was made in sight of The Naiad. It is, therefore, fair to infer the other vessels, her prizes, must have been mistaken by the master for frigates. No mention is made of the fleet being in sight, although a witness on board the prize very vaguely states the capture took place in sight of The Naiad, other ships of war, and merchant vessels. Upon such evidence of sight the court cannot admit a claim, founded upon possible constructive assistance, to the prejudice of actual captors. No evidence for the fleet has been adduced from persons on board the admiral's ship, although it is probable a stricter attention was paid to every occurrence of this nature on board her, being the repeating vessel, than any other vessel in the squadron. The journals of Captain Ferrier and his two lieutenants *state positively they lost [*219] sight of the fleet at two o'clock. A lieutenant and master's mate of The Albion, both releasing witnesses, doubt whether The Albion could have seen or exchanged signals with the fleet at the commencement, and deny that the fleet could have seen the prize during any part of the chase. Nor can any reasonable doubt be entertained on the subject, the prize being distant from The Albion, at its commencement, twelve or fourteen miles, The Albion five or six leagues from the fleet; both these vessels steering north-east, and the fleet south-east and by south, their distance from the fleet must have necessarily increased until the chase concluded, when they

could not be less than forty or fifty miles asunder. In addition to this evidence, the opinion of the Trinity Masters, corroborating the statement of the actual captors, which opinion was deduced from an accurate examination of the logs of the different vessels composing the squadron, must be conclusive of this case, and lead the court to confirm the sentence appealed from.

Adams, same side. It has been often repeated here and in other courts of prize, the ground of constructive coöperation is not one which should be very much extended; whilst the claim of actual captors should from every motive of policy and justice be favorably received. On the question of sight, upon which the present claim is founded alone, can the court interfere between the Trinity Elders and the parties? Can these persons be supposed to be influenced in the opinion given? Or rather what impartiality and accuracy should there be expected in the proceedings in the court below when the court is found associating itself with them in the investigation? [* 220] To see a chance, so as to entitle the persons * seeing, it is absolutely necessary that the chasing and the chased be in sight. The decision upon which the court below acted positively negatives the possibility of such a view of the prize by the fleet; and the court will act judiciously in adopting this opinion rather than resort to ships' logs and journals extremely unintelligible except to naval men, in order to form for itself a conclusion as to the relative distances and bearings of these vessels.

Much reliance is placed no doubt upon the circumstance of the association of these vessels at the time. The *Albion* appears to have been detached *de facto*, and that in consequence of the performance of a duty enjoined by the commander-in-chief. This was a duty specifically enjoined and solely pointed to the capture of *La Petronelle*. If there had been any culpable omission on the part of *The Albion*, why have not those so fond of setting out the regulations of a fleet associated together under one head, preferred an accusation against Captain Ferrier? They are aware it would not be prudent, yet here they have the temerity to bring a charge against a meritorious officer of *negligentiæ dolo proximæ*, if not of actual deceit itself. The *Ardent*, *Venerable*, and other ships of the fleet, who it is contended saw the chase, have been guilty of an extraordinary oversight in not recording that fact in their log-books, which must have been known at the time to be most material to their interest. The directions and regulations pleaded as the foundation of this extraordinary claim if carried to their greatest length would be productive of very great inconvenience, and tend so materially to procrastinate

the operations of war, that vessels of the enemy would often be enabled to escape in sight of a numerous squadron. If it were a *question upon the right to share in the flag-eighth of [* 221] a prize captured under these circumstances, it might with more consistency and effect be argued that the second chase might be legally considered as a consequence of the detachment upon the first, and that by such a detachment the flag-officer or officers were entitled; but were the claim of such officers even admitted as established, it would not in the least illustrate the matter now at issue. Here the question relates to the several interests of every party in the fleet who by a forced and overstrained construction of regulations, manifestly open to exceptions, are to be considered entitled to share in a capture where even the fact of sight at the time of capture is only attempted to be sustained by one of the claiming ships.

Jenner, for the fleet. If the fact of sight, so distinctly proved by the witnesses from on board *The Ardent*, were not sufficient to sustain the claim of the fleet, still the validity of this claim must be admitted as a consequence of the detachment of *The Albion* by the command of the superior officer. The detachment to chase a strange sail in sight must also be supposed to include a discretionary permission to chase any other suspicious sail. Indeed, it must in the true spirit of naval warfare be considered part of the duty enjoined, especially as one of the objects, and a principal object, of this as well as of every other cruise, was the interception of the trade of the enemy. In our allegation it is assumed that Captain Ferrier thought it unnecessary to make a fresh signal from a conviction that he was merely performing a duty imposed on him by this detachment from the main body of the fleet. Though it certainly was a part of his duty to have made a signal in order that he might be provided with instructions *from the admiral, yet if he proceeded im- [* 222] mediately to chase, apprehending it to be his duty, he must be concluded to be still acting under the signal made by the admiral. If this should, however, appear a material neglect of duty, he cannot be permitted to derive any advantage from that which is in itself culpable. No fraud is imputed to him, yet, from the regulations pleaded in the allegation, it must be acknowledged he has been guilty of a great omission, and it cannot be for the interest of his Majesty's service that such omission should be encouraged in courts of prize by construing the omission most favorably for the civil interest of the offender. The decision in the court below was principally guided by the opinion given by the Trinity Masters. This was formed from a review of the logs of the various vessels composing the fleet. To

both of these we object, to the logs as full of glaring inconsistencies and self-detected inaccuracies, to the Trinity Masters as incompetent judges; whatever experience they may possess is confined to the navigation and practice of merchant vessels, but they are totally incompetent to decide a question of this nature upon a review of the logs of men-of-war, whose mode of sailing on a cruise is singularly complicated and uncertain. To ascertain their bearings, distances, latitude, and longitude, is a matter of considerable difficulty to those on board, and great inaccuracy in general pervades the entries of such vessels logs. In the present instance the entries are totally irreconcilable with each other. The Trinity Masters then taking their data from imperfect documents, and being unacquainted with the practice of ships of war, cannot be right in their determination. The court will, therefore, see the necessity of referring this matter at issue to more competent judges of the logs and practice of ships of war.

[* 223] * *Adams* observed, it was immaterial whether the particular entries were or were not perfectly accurate, since the Trinity masters worked the loss for themselves previous to their coming to any decision.

As long as these entries are considered part of the data upon which they proceed to determine, that determination must be liable to error. A blank chart was placed before these gentlemen, and they were required to point out the actual position of the vessels composing the fleet at the time, and ascertain whether any were in sight at the capture. But this could only be done by inference from erroneous documents, which they had not the practical knowledge to correct. This practical knowledge it is suggested is to be found in the officers of his Majesty's navy, and to them the question may be referred with more satisfaction to all the parties concerned. The positive evidence of the fact is minute and satisfactory. The lieutenant of the prize speaks distinctly of other ships of war and merchant vessels in sight. He could scarcely be mistaken. Captain Bell of the marines says, both *The Albion* and prize continued long in sight of the whole fleet during greater part of the chase. At three o'clock several were then in sight, and at the commencement of the chase *The Albion* was within signal distance of the fleet. He was placed in the best possible situation to be enabled to speak distinctly to the fact, *The Ardent* being on the look-out to the north-east, at a distance from the fleet, and the chase continuing in that direction. *Essel*, midshipman on board *The Ardent*, deposes to the same effect. It is asked, Why have not other witnesses been examined from on

Le Bon Adventure. 1 Acton.

board other vessels? The answer is obvious. As the situation of this vessel was best calculated for observing the chase, the claimants *naturally inferred they should thence derive the [* 224] least controvertible evidence of the fact. The fleet must be considered entitled to share upon another principle, independent altogether of the facts of sight, namely, that of joint cōoperation on a particular service under a particular commander-in-chief. What distance, or whether any, would remove the responsibility under which he acted, so as to render any prizes made by him at such a distance exclusively his own, is a question here unnecessary to examine, since it is evident from the logs of the fleet, that at the time of commencing the second chase *The Albion's* distance from the fleet did not exceed nine or ten miles, although one of the witnesses on board her has stated it to exceed twenty. She must, therefore, have been within signal distance, and might have waited for instructions respecting the strange sail had not Captain Ferrier considered the chase as a part of his duty as an associated officer of the squadron. If it were for a moment supposed that the neglect arose from a wish to avail himself of a pretext to set up an exclusive title, the disposition of the court would be to defeat the fraud, as has been already expressed in the case of *The Robert*; and also in the case of *The Herman Parlo*,¹ mentioned in that of *The Waaksamheid*,² where the captor, though associated, extinguished his lights to prevent any other vessels seeing the chase; the court acquiesced in the argument that it would be very improper to let the neglect or fraud of a party enure to his benefit; a considerable part of the argument in this case as well as in that of *The Woxenhith* is particularly applicable to this case, so far as proceeds upon the assumption of neglect on the part of Captain Ferrier; and here it may be proper to observe, that it does not *immediately follow, as has been [* 225] argued, that if an officer be guilty of neglect he should be immediately brought to trial by a court martial; as in cases like the present where degree of the offence against naval regulation is comparatively small, owing to the latitude of discretion assumed by officers under similar situations. Hence, though no notice may have been taken of the neglect by the admiral at the time, they are perfectly at liberty to raise the objection when it is attempted by the offender to render this neglect a substantive ground of a civil right to their prejudice.

¹ Lords, April 12, 1785.

² 3 Rob. Rep. 3.

Le Bon Adventure. 1 Acton.

February 28, 1810. *Stephen*, same side, argued at considerable length on the inaccuracy of the logs offered in evidence, not only with respect to the bearing of each vessel, but even with respect to the bearing of a common point or headland, Ushant. No notice had been taken even in the appearance of *La Petronelle* in the admiral's log. The bearing of Ushant had been described in the journal of one of *The Albion's* lieutenants as distant twenty-three miles; by another lieutenant's journal on board the same ship as many leagues. "With such journals," he argued, "what could be done by the Trinity Masters to ascertain the point in dispute, whose judgment in matters of this nature had often afforded a subject of successful mirth and derision to a late civilian of eminence in this court and that below."¹ Admitting even the maxim *cuilibet in sua arte pretendum*, here their skill must be unavailing, since the documents submitted to them are perfectly irreconcilable with themselves, or with any thing which they have been accustomed to examine and determine upon. They [* 226] generally calculate *upon the progress or situation of merchant ships at stated periods, which vessels proceed uniformly and with as little deviation from a straight line as possible to their respective places of destination. This mode of calculation is not applicable, therefore, to vessels cruising in a zig-zag direction for several days or weeks, until their reckonings become so intricate that they can scarcely tell where they themselves are. The admiral has not been examined by either party, his memory being a perfect blank as to this capture. When the joint coöperation is so distinctly proved, there should be some presumption of the fact of sight when both, that day and the day after, the vessels were in conjunction pursuing the same object in sight of each other. This presumption, aided by our positive witnesses, may be sufficient to satisfy the court, although it is admitted that the proof lies upon the claimant. If proof of this nature will not be admitted, but the court will, in all cases, hold the fleet coöperating to strict proof how it may effect the service, it may not be easy to calculate, but it will, no doubt, materially increase the aptitude to litigation amongst the fairest claimants, and cause both this and the court below to overflow with business, whenever the prizes made may be worth the trouble or will defray more than the expenses of the suit. It may, therefore, be a question of serious importance to the court, whether a rule should not be adopted, that where a general and strong presumption of the necessity of sight being had at the time, naturally arises, vessels

¹ Doctor Lawrence.

claiming on the grounds of joint enterprise or association should not be suffered to avail themselves of general and probable evidence of the fact instead of more weighty and direct proof.

On the second point at issue between the parties, relating to the actual captors being within signal distance, it is necessary *to remark, that a vessel circumstanced as *The Albion*, [* 227] being within signal distance of another vessel associated and capable of communicating with the fleet, amounts to the same as though she were within the reach of a direct signal from the admiral's ship of such associated squadron. This is proved to be the exact situation of *The Albion* by the officers of *The Ardent*. This vessel must have been within signal distance of the fleet when the chase commenced, since, from calculating the number of knots sailed per hour by the fleet and *The Albion* in different directions, (the fleet four or five knots south-east by south, *The Albion*, north-east, eight knots,) at two hours after the chase commenced, the greatest elongation of *The Albion* from the fleet could not amount to twenty-five miles; this was the precise time when sight was lost. Now it has been considered, that signal distance is about two thirds of distance sight; that is, when the lower yards are out of the water. Hence, if the fleet were in sight at half-past two, it must have, at least, been within signal distance at the commencement of the chase, when the fleet and chaser were so many miles nearer each other. The accuracy of this calculation and inference is sustained by the positive evidence of Captain Bell, Mr. Essel, and the master of *La Petronelle*, whilst the releasing witnesses examined for the actual captors, speak with great hesitation, and only express doubts of *The Albion* being within signal distance. When releasing witnesses will go no farther, it ought to give rise to a strong presumption of the fact. It has been argued, that upon such doubtful grounds it would be unfair to let in a claim to the prejudice of actual captors. It was not the fault of the claimants that the fact is doubtful. Why did not Captain Ferrier hoist *a signal to ascertain [* 228] the fact? It would have removed all imputation of neglect of duty or unfairness of design. They allege it as an intolerable inconvenience to an officer chasing by signal, after making one capture, to be obliged to wait for a fresh signal to proceed in chase of another strange sail. He would have only to hoist a flag for that purpose, which would have been immediately answered if seen. If not, he might have consulted his own judgment and discretion. It would occasion no loss of time, since the signal might, perhaps, be made whilst putting about. Since no signal was attempted to be made, although it was the duty of the chaser, the fact ought to be presumed

to be with the fleet, and the consequences should be the same as if the signal had been made and permission granted. The case of Captain Milne has been referred to as analogous, whereas it appears he had actually violated his express orders not to remove from the station, which violation received the sanction of the Lords of the Admiralty expressly founded on the urgency and necessity of the case; and the question in the case was altogether different, turning on the proclamation relating to the right of flag-officers to share in captures presuming to be made with their aid and direction. Admiral Harvey could not be considered either directing or assisting in what was a positive breach and disobedience of his orders. Whatever might have been the result of such an undertaking, no prejudice to the admiral could arise. He could have no part in the subsequent gain or loss consequent upon this act of disobedience. In the case of *The Herman Parlo* relating to the extinction of lights by one vessel chasing in company with another —

[*229] * COURT. SIR JOHN NICHOL. "From a note which I took at the time the judgment in that case was pronounced, the determination of the court appears to have proceeded on different principles from that assumed in argument to-day. It was laid down, that a ship giving chase in company, the supervening darkness should not prevent a joint capture, though it were made only by one out of sight of the other, provided the chase were continued by both. Lord Camden observed, that *The Ranger* had been ordered to carry the lights, whilst the other went to take the Dutch ships. The lights were, therefore, put out by previous consent, and no *mala fides* appeared in the case."

No doubt the court will adjudge this case in the true spirit of a court of equity; and as in a case where the proceeds of an inheritance have been directed to be invested for the benefit of the heir, and have not been invested, a court of equity will suppose it done since it ought to have been done, so here your lordships will presume that signal which ought to have been could have been made. In the judgment pronounced here in the case of *The Diomedé*,¹ you have sanctioned the principle for which we contend. There a similar question arose. Admiral Duckworth being detached from the Mediterranean fleet in pursuit of a particular French squadron off the Salvages, was unable to overtake this squadron, but hearing of ano-

¹ Lords, July 8th, 1809, *supra*, p. 69.

ther during the pursuit of the former, he proceeded in quest and captured or destroyed it. The question was of extraordinary latitude ; namely, whether the commander and flag-officers of the Mediterranean squadron were entitled to share in his captures. The case of *Harvey v. Cooke*¹ was then argued at considerable length, yet your lordships decided in favor of the claim of the [*230] officers of the fleet. The principle in that case is applicable here, although the fact of detachment on a separate service does not form a part of this case. The chase of *La Petronelle*, in the first instance, brings in all the force of the principle of association upon which the judgment proceeded in *The Diomedé*. No doubt can be entertained, that had the chase of this prize been commenced by signal from the fleet, the whole would have been entitled to share in that capture.

The danger and impolicy of permitting an associated vessel to maintain an exclusive interest in prizes made when such an association existed at the beginning of the chase, forms another striking feature of this case. No authority whatever is to be found on record in support of such a permission. In the case of *The Vryheid*² the question of conjoint operation is fully considered, and the principles laid down by the learned judge are most favorable to the present claim. The claim of *The Vestal* to share was founded upon her detachment from the captors upon a service in some degree connected with the capture. The judge observed, that the being in sight at the time of the capture, at the commencement of an engagement, either in the act of chasing or in preparations for chase, or afterwards during its continuance, was necessary in order to support a claim of this description. "The question," he observes, then, "comes to this, was *The Vestal* in sight at the commencement of the chase before she separated? If so, it will clearly do; if not, I think as clearly it will not do." Upon this general rule the court, therefore, pronounced against the claim, as the association was broken off and the fact of sight not *proved. By the judgment pronounced in the case of *The* [*231] *Forsigheid*,³ it would appear that except in case of detachment by orders, or complete separation by accident, a capture made even out of sight, will enure to the benefit of joint captors in every case of coöperation upon a particular service. If it be maintained this case amounts to a detachment, it rests with them to prove the detachment. When did the detachment take place? Was it in chase of *La Petronelle*? If so, (though it is by no means intended

1 6 East, 220.

2 Rob. Rep. 30.

3 3 Robinson's Reports, 311.

Le Bon Adventure. 1 Acton.

to be conceded that this service amounted to a detachment, in a legal sense,) as soon as the service enjoined was completed by the known regulations of the navy, it was his duty to have returned. If such a service were permitted to be considered a detachment, there is no such thing as union in any associated squadron to be expected in future; various vessels must be forever detached in this strict sense of the word. But no court will ever be induced to endanger the safety and union of his Majesty's navy by determining that to be a detachment which has before been denominated by a high authority, in a similar case, *The Forseigheid*,¹ "a stretching out the arms of the fleet in a joint service, without dissolving in any manner the connection between them and the main body." Giving up both questions, of sight and signal distance, still, upon the authority just mentioned, the claim of the fleet to share, must be recognized; for, whilst it gives Captain Ferrier a right so to extend the arms of the fleet in order to intercept the enemy's trade, it demonstrates such a conduct to be merely his duty. This right should, however, be derived either from the general nature of the service or the express commands of the admiral, else the whole fleet might be endangered, whilst each might be justifiably employed in chasing, and out of sight of each [* 232] other, * without possibility of recall, or immediate reunion upon emergency. It is admitted, that were *The Venerable* seen by the prize, the title of the fleet would be indisputable; yet is it to be held, that where the prize sees the actual captor approaching, the actual captor being in sight of one of the associated squadron, no coöperation exists, and the squadron will not be entitled? This would be, indeed, playing fast and loose with the principle of coöperation to the manifest danger of the service. Whether a capture, after a chase commencing in sight, but continued until out of sight, where finally the capture is made, should enure to the benefit of the fleet with which the captor is associated at the time, is a question of extreme delicacy, and of last importance to the officers of his Majesty's navy, and the decision in this case will materially affect the established principles of union and discipline throughout the British navy, in one way or other.

Dallas, in reply. The questions which, from the printed reasons annexed to the case, it was supposed would have formed the only ground of discussion, are, first, Whether the prize and the fleet had reciprocal sight at the time of capture? secondly, Whether such sight

¹ 5 C. Robinson's Reports, 318.

was had during the chase? and, thirdly, Was The Albion within signal distance at its commencement? Upon the first, there can be doubt entertained from The Albion being so far distant from the fleet, that, at the utmost, she could barely be within signal distance; and the prize being also very far distant from The Albion, the sum of these distances will produce nearly, or rather somewhat more, than the distance of the prize from the fleet, and prove no such reciprocal sight could be had. When the master of the prize speaks of being captured in sight of three frigates, it is evident he considered

* The Naiad, and her two prizes, vessels of war. Upon the [*233] second question, the evidence is contradictory and inconclusive. But upon both, the opinion of the Trinity Masters is decisive, who, from the most minute investigation, pronounced that none of the fleet but The Albion saw the prize, which also saw none but The Albion. If any objection be raised against taking this as evidence, upon the ground of carelessness imputed to these gentlemen, what can be said of the documents exhibited in support of the claim? The shamefully incorrect logs and journals of the fleet, demonstrate that no reliance is to be had upon them; yet an application has been this day made to the court to refer this to captains of vessels of war, a specimen of whose own journals exhibits so much carelessness and inaccuracy. It should be recollected, the captain is not the person who navigates and steers the ship's course—he merely directs what general course she shall maintain; the actual steering and sailing of the vessel constitutes the duty of the sailing-master exclusively, who is so far answerable for the ship. These masters are all originally examined as to their qualifications by the gentlemen of the Trinity House, and receive their appointments to the different vessels upon the statement and recommendation given them by the Trinity Masters. The state of the wind being ascertained, the general bearings of several vessels known, the logs, journals, and documentary evidence submitted to these gentlemen, who are accustomed to work the logs for themselves, and not to take them as authentic in each detail, can it be maintained their opinion is more liable to be false than that of the captains themselves or any other set of men? Lord Mansfield, when he presided here, upon occasions like the present, would not permit counsel to go into objections * of this nature, but [*234] usually asked, Do you question the skill or the integrity of these persons? If the latter, it rests with you to impeach that which has hitherto been unimpeachable; if their skill, they are generally admitted to be the most competent judges of the matter. Upon the third question, it appears singular, that if Captain Ferrier were so plainly perceived to be chasing a prize in sight, no mention should be

made of it in the logs of the fleet, and particularly of The Venerable, from whence it is contended she could distinctly be seen, although every other strange sail in sight appears to have been therein noted down with many particulars. The admiral recollects nothing of the transaction. Yet it must be recollected, Captain Ferrier rejoined the squadron a few days after, and saw the admiral, who made no remonstrance, nor thought it necessary to institute any inquiry or call him to a court martial. A strong proof that the captain acted in the exercise of a sound discretion.

To prove so material a part of their case, the appellants rely solely on the evidence of Messrs. Bell and Essel, two persons, perhaps the least acquainted with nautical affairs, and least likely to be upon the look-out, and who have been, in a former instance, discredited. These persons speak positively to the fact of signal distance, whilst our witnesses, both nautical and competent judges, if a competent judgment could be formed, speak with diffidence, and seem anxious not to go beyond their positive knowledge. The evidence is not, therefore, all on one side, as stated. The judge below observed, that as no positive proof had been adduced of The Albion's being within signal distance, it was not fair to infer, that as Captain Ferrier had made the signal on a former occasion the same day, he would have [* 235] * neglected to have performed that duty before he had proceeded to chase the second vessel, had that not been prevented by a conviction of the inutility of the attempt, especially as he must have been convinced it could be productive of no exclusive benefit to him, as the fleet would be entitled whether he neglected the signal or not. The proof of being within signal distance, like that of being in sight, should rest altogether upon the asserted joint captors.

From the reasons annexed to the case, it was impossible to suppose the claim would have been founded upon the principle of association and coöperation; different cases having been cited, which are said to bear upon this part of the case; the judge below was certainly perfectly competent to have seen whether these cases were at variance with this decision. In *The Vryheid*, an allusion has been made to the case of *The San Joseph*,¹ wherein the whole fleet had been permitted to share with the actual captors, though not in sight. The *onus probandi* was admitted to lie upon the person setting up the construction, but the facts of that case were precisely the reverse of the present. The captors were detached for a particular service, out

¹ Lords, May 4, 1784.

of which the capture grew, the fleet bearing up all the while to support them. The specific service performed, they perceived another strange vessel, to which they gave chase, and captured out of sight of the fleet. Upon this the question arose, and the fleet were permitted to share upon the principle of conjoint enterprise and actual coöperation, and it was clearly proved the capture would have been made in sight had it not been for the night coming on during the chase.

Captain Ferrier chased by signal one vessel, which he succeeded in capturing out of signal distance; *another then [*236] appears, which he also chases, the fleet all the time bearing up for Brest, elongated from the captor and prize in a right angle, without affording any coöperation or ground for inferring this particular chase to originate in a joint enterprise. The case of *The For-sigheid*,¹ referred to a blockade, and strict orders had been given to the vessels afterwards making the capture, not to be out of sight of the admiral's signals. All were associated in the common enterprise of blockade. The prize herself was taken for a breach of blockade. "There was," said the learned judge, "therefore, no severance of the fleet. The admiral was of opinion the vessels were detached certainly from the rest of the squadron, but that species of detachment does not amount to a legal detachment." There is no principle in this case applicable to ours, and the cases cited, so far from illustrating, really weaken the claimant's case.

Much might be urged upon the important effect which the decision in this case must have upon the professional character of Captain Ferrier. He must feel peculiarly anxious for the additional sanction of his exclusive right to share, by the sentence of this court, as he no doubt feels himself placed in a delicate situation with respect to his brother officers, whose presumed interest in this capture he is compelled, by the duty he owes himself and the service, to endeavor to defeat. The prize is also of considerable magnitude, and if the exclusive interest of the actual captors be confirmed, their shares must be very valuable; whereas, should the fleet be permitted to share, the property will be subdivided into so many portions that no material benefit will result to any of the parties.

* JUDGMENT.

[*237]

SIR W. GRANT. The principal ground upon which the parties have requested us to refer this matter further is, the irreconcilable inconsistencies discoverable in the logs of the fleet, with

¹ 5 C. Robinson's Reports, 318.

respect to the particular bearings of these vessels during the chase and capture in question. These, it must be admitted, were however as obvious, or even more so, to the Trinity Masters, to whom they have already been submitted, than they can possibly be to any other set of men, if they really are competent to the duties of their station, in which they have certainly the decided advantage of daily experience. There appears to us no necessity to make the reference required. The inference the court is disposed to draw from all that has been furnished in evidence, or urged in argument, is, that the inconsistencies pointed out are perfectly immaterial, and will not prevent our arriving, in a satisfactory manner, to the point at issue, and to which the court below and the Trinity Masters appear to have directed their attention with equal anxiety. Two vessels, it is obvious, may differ with respect to their alleged situation off a particular point of land, yet their general courses being ascertained, combined with their rate of sailing and other minute circumstances, may afford an opportunity to competent judges for determining their relative distance, or even their distance with respect to a third object. There must, therefore, appear to be an obvious neglect in these particular gentlemen of the Trinity House, to induce us to refer the matter so ascertained by them for further investigation. No such particular neglect is here imputed, and they have decided no reciprocal sight was had at the time of capture.

[* 238] * On the second question (that of signal distance at the commencement of this particular chase) nothing has been said by the Trinity Masters to direct or govern our determination. The *onus probandi* must lie on those who set up the claim. The evidence, however, is extremely defective. In its absence, therefore, the uniform and general presumption that the captain did his duty, must extend to his conduct in this particular instance. It is obvious that, if he had been within signal distance, he might easily have been checked or recalled from the pursuit, had it been thought necessary to do so. Nothing has been advanced to oppose the presumption that Captain Ferrier did not do his duty, except what we are required to infer from the testimony of two gentlemen, Bell and Essel, who must, it plainly appears, have been mistaken, and who, it has been observed, have been formerly discredited on a similar occasion. We cannot absolutely say The Albion was not within signal distance, nor are we called upon so to decide. But it is not proved she was within reach of signals by the party alleging it. Upon the view afforded to the court on this part of the case, therefore, we can see nothing to affect the decision of the court below.

A third reason has been lately urged, which would have been paramount to all the rest, namely, that of association throughout the

The Diomede. 1 Acton.

whole transaction, comprising both chases, since it commenced within sight of the fleet. If this were a sufficient ground to support a claim, it is singular it should be resorted to in the last instance, since it would render it perfectly unnecessary to have entered into proof upon the other grounds of claim. Upon this principle, thus advanced, it is necessary to inquire, under *the circum- [*239] stances of the present case, whether a vessel commencing a second chase, in sight of a fleet of which she had constituted a part before she had been detached, by signal, upon a former chase, and capturing the second chase at any distance from such a fleet, would necessarily, upon this principle, be compelled to let in the claim of the whole fleet, to share in a prize so made, notwithstanding such fleet afforded no assistance or coöperation in the capture, but actually bore away from the captor on another tack. No such principle has ever been recognized, nor do the cases cited support any such construction of the term association.

SENTENCE.

Pronounced against the appeal, and confirmed the sentence of the court below.

DIOMEDE.¹

February 24, 1810.

Flag-eighth. Commander-in-chief of a station, together with his junior flag-officers, entitled to share as constructively assisting in a capture, made in consequence of the detachment of another junior flag-officer in chase of a particular fleet, which having escaped, and intelligence being received of another fleet cruising in a different quarter, a second chase was commenced without any fresh order, and continued until the capture was finally made within the limits of another admiral's station, one of whose vessels assisted in the capture. The claim of the admiral, in whose station the capture was made, rejected. Claim of a junior flag-officer on another station, who communicated the intelligence which led to the capture, in which he also assisted, admitted.

SENTENCE.

THE court pronounced against the appeal, and affirmed the sentence of the High Court of Admiralty, with respect to the said ship.

¹ See page 69.

The Amedie. 1 Acton.

[* 240]

*AMEDIE, Johnson, master.

March 17, 1810.

American slave trade. Transportation of slaves from the coast of Africa to Matanzas, in the island of Cuba, a colony of the enemy, illegal, and affects the property of the ship and her cargo of slaves. The decree of the court below affirmed, condemning the cargo of slaves as prize to the sole use of his Majesty, (which were afterwards set at liberty,) and the ship as lawful prize to the captor. The trade considered to be prohibited by the American law; which, having been officially notified to the court, the neutral was excluded from the benefit he would otherwise have derived from the silence or permission of the law of America, notwithstanding the prohibitory enactments of Great Britain.¹

In this case an appeal was prosecuted from the sentence of the Vice-Admiralty Court of Tortola, condemning this American ship and a cargo of slaves, as engaged in an illegal trade, from Bonny, on the coast of Africa, to Matanzas, in the island of Cuba.

The *King's Advocate* and *Stephen*, for the captor. The capture and condemnation of this vessel appears perfectly conformable to the existing legislative enactments made by the American government, of which the claimant is a subject, and by the British government, under whose authority the captor, (as commander of a brig in his Majesty's service,) acted. This vessel sailed not until the month of September, 1807, for the coast of Africa, although the letter of instruction and clearance are dated in June preceding. The *Amedie* and another vessel, *The Semiramis*, belonging to the same owner, (Mr. Groves, of Charlestown,) sailed in company together, and were put under the management of a Mr. Scott, an Englishman, as supercargo of both vessels, who continued to act in that capacity until these vessels returned from the coast, and parted on the voyage home. The return cargo consisted of 105 slaves, which are described as the sole property of Mr. Groves by the master and mate; but one of the seamen positively swears he heard Martin Robin (the master on the former part of the voyage, but who died on the passage homeward) say, the cargo had been shipped for account of a Mr. de Poe, also of Charlestown. This circumstance, coupled with the [* 241] singular tenor of the letter of instructions to the *master, for the regulation of his conduct in the prosecution of this voyage, cannot fail to awaken considerable suspicion that the pro-

¹ [The *Africa*, 2 Acton, 1; The *Fortuna*, 1 Dod. 81.]

perty is not strictly neutral. What may be the connections of this De Poe does not appear in evidence; but when a witness is found stating, as from very competent authority, that the property is not such as the claimant's witnesses describe, and the vessel is afterwards found deviating to an enemy's colony, in such a case as this, when, at the utmost, a justification can only be set up on the strict letter of the law, permitting the importation to America for a very limited period indeed, but contrary to the conviction of the American government of the disgraceful nature of this trade, and after it had even come to a resolution to abolish it altogether, it is but the exercise of a laudable caution on the part of the court to look upon the whole train of evidence with a scrupulous exactness and suspicion. A short time after leaving the coast, the original master dying, Mr. Johnson succeeded him. He had not known any thing of her previous to the present voyage; the captors, therefore, are deprived of the advantages generally resulting from the examination of a confidential agent. The present master cannot speak as to the usual course of this vessel's trade, or the voyages she may have formerly made. Evidence on this point would have been extremely material, especially as this vessel is found deviating to a foreign port, contrary to the existing laws of America, which commenced the abolition of this inhuman traffic, by prohibiting to its subjects the foreign slave trade altogether; and when so much occasion has been given for suspicion, it cannot consistently be admitted, as in other cases it might, that this deficiency of proof, occasioned by the death of the original master, may be equally, or perhaps *more [*242] prejudicial to the interest of the claimant. Mr. Johnson states he understood it was the intention of the former master to proceed from the coast to Charlestown, who had received from his owner instructions to make all possible expedition, so as to reach Charlestown before the 1st day of January, 1808, as the American government had prohibited the African slave trade after the expiration of the year 1807. If he found it impossible to return¹ "within the time limited by the laws of his country," he was directed "to proceed by way of the old Straits of Bahama to Matanzas, where he should find further instructions to regulate his future proceedings." In obedience to these instructions, Mr. Johnson, on the 22d, he thinks, of December, as nearly as he can guess, considering it impossible from his bearing to make the voyage within the limited time, altered the ship's course and bore away for Cuba. Almost immediately after this deviation the vessel was captured.

¹ Letter of Instructions.

The first of the reasons assigned by the captors, in their printed case for condemnation of this vessel, is, that "this ship was proceeding from Africa, with a cargo there laden, to Matanzas, in the island of Cuba, being a port of a colony then belonging to his Majesty's enemies, contrary to the prohibitions of the order of his Majesty in council, of the 11th day of November, 1807." The facts of this case prove this capture to have been justified by and within the meaning of the first section of this order; which provides, amongst other things, that "all places or ports in the colonies belonging to his

Majesty's enemies shall be subject to the same restrictions, [* 243] in *point of trade and navigation, (with the exceptions hereinafter mentioned,) as if the same were actually blockaded by his Majesty's naval forces in the most strict and rigorous manner," and by no means included within the exceptions which are subsequently enumerated. The vessel appears not only to have been taken in attempting to enter Cuba, but from her long delay in America, not sailing on the outward voyage until September, though her clearance is dated in June, it must be obvious that the owner had in contemplation this destination to Cuba, *ab origine*, and therefore purposely avoided despatching her sooner, wishing her to arrive in the West Indies at that period when the hurricanes had subsided, and the navigation there become safer and attended with less difficulty. If such had not been the original design of the voyage, why was this vessel taken the very day the master asserts he had altered his intention of going to Charlestown, in the intricate and difficult navigation of the West India islands. This was not the natural and usual routine of such a voyage. Had such been actually his intention, he should have taken advantage of the trade winds, and held a more easterly course until he arrived nearly in the latitude of Charlestown. This circumstance refutes the allegation of the master respecting the original intention of the return voyage.

The second reason assigned by the captors states "the voyage was contrary to the prohibitory laws of the United States of America, made for abolishing the slave trade, which have been officially notified to your lordships by the act of the American government in the case of *The Chance*, Brown, master; and although such laws of a foreign state may not amount to a direct or substantive [* 244] ground of condemnation in a court of *prize, yet they may and ought to exclude an American claimant from the benefit of those relaxations of the law of war which, in favor of neutral states, have been introduced by his Majesty's instructions, in regard to their commerce with the colonies of his Majesty's enemies; a privilege which can only be understood to be granted to neutral go-

vernments as a branch of their national commerce, and not as an invitation to lawless individuals to engage in a trade which the neutral state itself has prohibited, and desires to discourage." If it be contended on general principles that a trade to an enemy's colony from a port on the coast of Africa (which may be considered a sort of free port, open to most nations for this particular traffic) is to be identified with that species of trade which has been included within the subsequent exceptions to the order above mentioned, namely, a trade from a port to which the vessel belongs to a port in the enemy's colony, the argument would be inapplicable here, inasmuch as the American government have, by the notification in the case alluded to, disclaimed and disavowed this particular trade; and if it has declared this trade generally to be illegal, it will be for the claimant to show most satisfactorily something in this particular instance to take him out of the operations of the general law. The captors assign as a third ground of condemnation, "that Scott, the supercargo and lader of the slaves, is admitted to have an interest therein, which is liable to confiscation, he being a British subject, by the statute 46 G. III., c. 52." It is remarkable, this person, whose authority over this property seems to have been almost without bounds, is never once mentioned by the master in his examination. The seamen, however, speak of him as the person to whom the whole [* 245] management of the outward and return cargoes were confided, and, as far as they knew, had no interest in this property, except a commission upon the slaves purchased. It is ascertained that this person had been interrupted in his usual course of trade in this country, had quitted it, and arrived in America, where he immediately embarked in this speculation, being well versed in the African trade. Is it then likely that a man leaving his own country in consequence of his being unable to exert his own capital in the usual way, should be content to be a mere agent for another, and not have a proportion of capital engaged. In the same degree that the claimant seems anxious to keep the nature of this engagement between him and Mr. Scott out of sight, the court will no doubt be inclined to look on its concealment with suspicion. The last reason is of a general nature, and inferential from the former, namely, "There is strong ground to presume the case is fraudulent, and that the property belonged at the time of capture either to his Majesty's enemies or to British subjects trading with the enemy, contrary to their allegiance."

Dallas and *Arnold*, for the claimants. The weakness of the captor's case for condemnation upon the general question respecting

The Amedie. 1 Acton.

colonial regulation, and the operation of the American law as affecting this property, has compelled them to have recourse to the usual arguments to prove the property is falsely described. Yet nothing satisfactory has been offered to the court upon this part of their case.

The proof is all on one side, if we except the evidence of [* 246] one of the seamen, who appears grossly ignorant in * other parts of his deposition upon the most common subjects. The examinations of every other witness, together with the ship's papers, prove the property to be solely in Mr. Groves. Mr. Scott was entitled to a mere commission as agent or supercargo. Such he is described in the letter of instructions. It has been said, the nature of this letter is highly objectionable. By this letter the master is merely directed, should he find himself at too great a distance from Charlestown when in the latitude of the West Indies to arrive previous to the month of January, to make Matanzas. So far from any impropriety in this direction, it must be evident that the intention of Mr. Groves was faithfully and punctually to observe the regulation of his own government, and by no means to run any risk whatever. The American government, by limiting the continuance of the trade, sanctioned that trade during the period so limited; every subject, therefore, was perfectly at liberty to exert his capital as usual during that period, and Mr. Groves had been long engaged in this species of traffic. He was, therefore, a person peculiarly in the contemplation of the American law when the exception was made to the general prohibition. It was to permit such persons to withdraw their capital at leisure from this traffic, a provision perfectly consistent with sound policy and common justice. Mr. Groves, therefore, had a right not only to continue his trade, but to expect that the most liberal allowances would be made in his favor by his own government, should any unfavorable occurrence take place. He had a right to expect that upright intention would constitute, under such circumstances, a just claim to favor and indulgence. From other govern- [* 247] ments or their enactments he had nothing to fear, * since the right of American citizens to carry on this trade could not be questioned. He was justified in calculating even to the latest moment upon the indulgence extended to merchants in his situation; but more particularly in this instance, when a competent and reasonable time was given for the performance of the voyage. Had the vessel arrived subsequent to the 1st of January in Charlestown, he would, no doubt, have been considered entitled to yet greater indulgence, and under such peculiar circumstances might, perhaps, have been permitted to land and dispose of his cargo. But he had every possible right to give the directions contained in his letter to the master. In fact

the letter displays the utmost promptitude on the part of Mr. Groves to avoid any possible breach of the American law. He calculates upon a failure which was scarcely probable, provides a contingent destination for this vessel, and directs the master to proceed to Matanzas. For what purpose? Not for the purposes of trade. Such does not appear to be his intention. But to go there for the purpose of receiving further instructions. What these instructions might be cannot be inferred from the present evidence in the cause, they might have contained orders to set these slaves at liberty, but certainly from the tenor of the claimant's conduct it may be fairly inferred they would not have enjoined any illegal or unauthorized project. To ascertain the nature of these instructions may appear desirable before the court proceeds to adjudication. We are anxious to afford every possible information; but upon the present proof it must be evident that the part of the argument founded upon the assumption that this vessel was taken trading to the enemy's colony is without foundation. The fact is denied, and this case is not included within the restrictions * of his Majesty's orders in [* 248] council respecting a trade to the colonies of the enemy by neutral subjects, although it may admit of considerable doubt whether the case of a vessel sailing from such a port as that of Bonny, on the slave coast, to the enemy's colony, can be considered that species of trade prohibited by his Majesty's orders issued during the present war. The proof of property being, therefore, complete and unimpeachable, the court will probably be of opinion, that upon the remaining parts of the case, if there is not yet sufficient proof for restitution, there certainly is not sufficient to sustain the judgment of the court below, condemning both ship and cargo as lawful prize, and will, therefore, direct further proof to be introduced.

His Majesty's Advocate, in reply. It will be extremely difficult to suggest any substantial grounds to support this application to introduce further proof respecting this property. From its nature it is impossible, let that proof be what it may, restitution can be decreed. The slaves have been set at liberty by the crown, to whom they have been condemned, and this in conformity with the law of America. They must appear, therefore, to the court in the same point of view as if they had actually perished altogether. Under almost any circumstances the court would not be disposed to revive them for the purposes of slavery. Suppose a case should occur of justifiable capture, where the property being of a perishable nature, had been destroyed while in the captor's custody, previous to any judicial decision, would that be a case in which a court of justice would decree

restitution. Neither would it in the present case decree restitution *in specie*; nor yet give a compensation in the way of damages, *unless something was disclosed strongly impeaching the justifiableness of the seizure. But here the question is simply, will the court strain a point to reinstate this claimant in the possession of these unhappy beings or an equivalent, who appears to have been acting in violation of his engagements to his own government, and under a conviction that in case of capture by British subjects, our prize courts would necessarily take every presumption strongly against him? His personal credibility is much impeached by the circumstances under which the enterprise commenced. Nor can he be considered capable of making proof to the satisfaction of the court, where the property appears *prima facie* subject to confiscation, and the proprietor must necessarily have been liable to severe penalties for the infringement of his own laws had the nature of this transaction been known to his own government.

JUDGMENT.¹ July 28, 1810.

SIR WM. GRANT. In the case of *The Amedie* it must be considered on the evidence produced to the court, and from the situation of this vessel at the time of capture, that she was employed in carrying slaves from the coast of Africa to a Spanish colony. We are of opinion this appears to have been the original design and purpose of the voyage, notwithstanding the pretence set up to veil the real intention of the proprietor. The American claimant, however, complains of the injury and interruption he has sustained in carrying on his usual and lawful trade, that of importing slaves for the purpose of sale, and calls upon the Prize Court to redress the grievance and repair the damage he has sustained by the capture and unjust detention of this vessel. On the different occasions when [* 250] *cases of this description formerly came before the court, the slave trade was liable to considerations very different from those which now belong to it. So far as respected the transportation of slaves to the colonies of foreign nations, this trade had been prohibited by the laws of America only; this country had taken no notice of that prohibition; our law sanctioned the trade which it was the policy of the American law first to restrict and finally to abolish. It appeared to us, therefore, difficult to consider the prohibitory law of America in any other light than as one of those municipal regulations of a foreign state of which this court could not take

¹ [This judgment is reported in 1 Dod. 84, note.]

any cognizance, and, of course, could not be called upon to enforce ; nor could it possibly bar a party in a court of prize. But by the alteration which has since taken place in our law, the question stands now upon very different grounds. We do now, and did at the time of this capture, take an interest in preventing that traffic in which this ship was engaged. The slave trade has since been totally abolished in this country, and our legislature has declared the African slave trade is contrary to the principles of justice and humanity. Whatever opinion, as private individuals, we before might have entertained upon the nature of this trade, no court of justice could with propriety have assumed such a position as the basis of any of its decisions whilst it was permitted by our own laws. But we do now lay down as a principle, that this is a trade which cannot, abstractedly speaking, be said to have a legitimate existence ; I say, abstractedly speaking, because we cannot legislate for other countries ; nor has this country a right to control any foreign legislature that may think proper to dissent from this doctrine and give * permission to its subjects to prosecute this trade. We [* 251] cannot, certainly, compel the subjects of other nations to observe any other than the first and generally received principles of universal law. But thus far we are now entitled to act, according to our law, and to hold that *primâ facie* the trade is altogether illegal, and thus to throw on a claimant the whole burden of proof, in order to show that by the particular law of his own country he is entitled to carry on this traffic. As the case now stands, we think that no claimant can be heard in an application to a court of prize for the restoration of the human beings he carried unjustly to another country for the purpose of disposing of them as slaves. The consequence of making such proof is not now necessary to determine ; but where it cannot be made, the party must be considered to have failed in establishing his asserted right. We are of opinion, upon the whole, that persons engaged in such a trade cannot, upon principles of universal law, have a right to be heard upon a claim of this nature in any court. In the present case the claimant does not bring himself within the protection of the law of his own country ; he appears to have been acting in direct violation of that law which admits of no right of property such as he claims. Ours is express and satisfactory upon the subject. Where, therefore, there is no right established to carry on this trade, no claim to restitution of this property can be admitted. We are hence of opinion the sentence of the court below was valid, and ought to be affirmed.

The Hare. 1 Acton.

SENTENCE.

Pronounced against the appeal and affirmed the sentence of the court below, condemning the ship and cargo as lawful prize.

[* 252]

* THE HARE, Chew, master.

March 25, 1810.

Blockade of Cadiz, whether fairly and legally imposed by a fleet's appearance off the port, prohibiting the entrance of all vessels.

Notoriety of the fact and knowledge of its intention sufficient to bind the neutral. Under such circumstances formal notification rendered unnecessary.

THIS was a leading case of several appeals from the sentence of the Vice-Admiralty Court of Gibraltar, condemning this and several other vessels for a breach of the blockade of Cadiz and San Lucar, imposed on these ports by a squadron under the command of Admiral C. Collingwood, pursuant to an order of the Lords of the Admiralty, dated the 8th June, 1805.

The *King's Advocate*, for the captors. A review of the facts of this case will be sufficient to prove the existence of an actual blockade during the period in which this vessel was taking in a cargo, and which was continued with unabating rigor long subsequent to her departure from the harbor of Cadiz. These ports had been put under blockade by a notification dated the 25th of April, 1805, at which time the appearance of a superior force of the enemy compelled the blockading squadron to retire. In consequence of this interruption the Lords of the Admiralty, on the 8th of June follow-
[* 253] ing issued an order¹ to Admiral Collingwood, command-

¹ By the Commissioners for executing the office of Lord High Admiral of the United Kingdom of Great Britain and Ireland, &c.

THE Earl Camden, one of his Majesty's principal secretaries of state, having by his letter of the 18th of April last, acquainted us that his Majesty had judged it expedient for the protection of his subjects, and the annoyance of his enemies, to direct that the most rigorous blockade should be established at the entrance of the ports of Cadiz and San Lucar, and that the said blockade should be maintained and enforced in the strictest manner, according to the usages of war, acknowledged and allowed in similar cases, and that his Majesty had been pleased to cause the same to be signified to the

The Hare. 1 Acton.

ing him to enforce and maintain the same in the most rigorous manner, to apprise all vessels sailing thither ignorant of its existence, and endorse their papers to that effect; to detain [* 254] all neutral vessels coming out of these ports, having on board goods appearing to have been laden after knowledge of the blockade, but to permit neutral vessels in ballast, (except those which might have entered in breach of the blockade,) or having only on board goods laden before the knowledge of the blockade, to sail from thence without interruption with a similar notice and warning endorsed on the ship's papers. This order, so precise in its terms and strict in its provisions, was enforced and executed by a general order to that effect from the admiral to the several officers upon the station, dated the

ministers of neutral powers residing at his court, and, likewise, from the time above mentioned, all the measures authorized by the law of nations, and the respective treaties between his Majesty and the different neutral powers, would be adopted and executed with respect to all vessels which may attempt to violate the said blockade. We do, in pursuance of his Majesty's pleasure, signified to us by his lordship, hereby require and direct you to employ such part of the squadron under your command, as you shall find necessary, in blockading the entrance of the ports of Cadiz and San Lucar accordingly, and to give orders to the officers who may from time to time be so employed, to stop all neutral vessels destined to those ports, and if they shall appear to be ignorant of the existence of the blockade, and have no enemies' property on board, then only to turn them away, apprising them that the said ports are in a state of the most complete and rigorous blockade, and writing a notice to that effect upon one or more of the principal ship papers; but if any neutral vessel, which shall appear to have been so warned, or otherwise informed of the existence of the blockade, or to have sailed from the last clearing port, after it may reasonably be supposed that the notification before mentioned might have been made public at such port, shall yet be found attempting or intending to enter either of the said ports of Cadiz or San Lucar, you are to direct the said officers to seize such vessels and send them into port for legal adjudication; and in respect to neutral vessels coming out of the ports of Cadiz or Saint Lucar, any such vessel having goods on board, appearing to have been laden after knowledge of the blockade, shall in like manner be seized and sent in for legal adjudication; but neutral vessels coming out of the ports of Cadiz or Saint Lucar in ballast, (except such as shall have entered in breach of the blockade,) or having only goods on board laden before the knowledge of the blockade, shall be suffered to pass, (except there be other just grounds of detention,) with a similar notice and warning to be written upon the papers, prohibiting such vessel from again attempting to enter either of the said ports, and also stating the reason for their permitting her to pass.

Given under our hands the 8th of June, 1805.

(Signed)

J. GAMBLER.
PHILIP PATTEN.
GARLIES.

To Cuthbert Collingwood, Esq.

Vice-Admiral Collingwood, &c., &c., &c., off Cadiz.

By command of their Lordships,

(Signed)

JOHN BARROW.

23d day of the same month. These orders have been copied from the general order book of the admiralty, and introduced by the captors into this cause. In confirmation of the notoriety of the circumstances attending this blockade, an affidavit has been introduced made by the clerk of the admiral's ship *The Colossus*, stating that during that block-

ade numbers of vessels had been warned off or captured in en-
 [* 255] deavoring * to enter or depart from these ports, and that from all the circumstances, he verily and in his conscience believes this was known at Cadiz and San Lucar to be, from its commencement, a regular and strict blockade, maintained generally for the purpose of prohibiting all commercial and other intercourse whatever with those ports. Further evidence has been adduced to establish this particular fact from the log of the ship *Paulina*, found in the registry of the Vice-Admiralty Court of Gibraltar, in which are these entries: "This day, (5th June, 1805,) appeared off the port, four British ships of the line and three armed brigs, considered the blockading squadron." "7th June, Admiral Nelson's fleet appeared off the harbor and placed the port in a state of blockade." Upon this incontrovertible evidence, stands that fact which must be considered conclusive as against any application for reversing the sentence of the court below. The immediate circumstances under which the vessel sailed, are as follows: she is admitted to be an American, and sailed from New York to Cadiz, where she took in a return cargo of salt and wine, which was put on board, a small part in the latter end of June, and the remainder in July. On the 21st of July she cleared out from Cadiz; the master must, therefore, be perfectly apprised during the time whilst the cargo was shipping, and at the moment of leaving the port, that he was liable to detention in consequence of this attempt to violate the blockade, which was then so notorious. In order to make out any sort of a case upon which the court might be induced to restore this vessel, it is intended to have recourse to the original blockade, which it appears had been discontinued in
 [* 256] consequence of the appearance of a * superior French force off the harbor. This blockade having been interrupted, it may be contended, that the reappearance of a fleet off these ports, was not, of itself, sufficient to constitute a renewal of the blockade, and that, in order to revive and clothe it with all the legal consequences of a blockade, it was equally necessary it should be regularly notified, and attended with all other usual formalities, as if no previous blockade had existed. The appellant, by his printed case, appears to have assumed these principles as a basis, and proceeds to prove, by papers introduced into this cause from the additional appendix of *The Argus*,¹

¹ One of the causes on the list for sentence upon a similar appeal.

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that no notification was regularly made of the blockade previous to the capture. These are the certificates of the American and Danish consuls at Cadiz, which state, that a notification, dated the 29th March, 1805, had been received from the British admiral, Sir John Orde, by the governors of Cadiz, informing him, that notwithstanding the existence of the blockade, he was authorized to permit neutral vessels with innocent cargoes, also neutral property, freely to enter and sail from the ports of Cadiz and San Lucar; but that vessels laden wholly or in part with naval or military stores, provisions, and grain, were prohibited as usual. The certificates add, that no other notifications had been since received. In consequence of this notification, various vessels entered and left these ports, and so continued to enter and depart until some time previous to this capture, when, in consequence of the seizure of some neutral vessels sailing from thence, a representation had been made *by the neutral con- [*257] suls to the British admiral, Sir C. Collingwood, then commanding on the station, complaining of the detention of the said vessels. To which he returned an answer on the 23d of July, announcing that he acted under express orders from the admiralty, to maintain a strict and rigorous blockade on these ports. In referring to the case of *The Hoffnung*,¹ the principle supplied by the judgment in that case, although the vessel was there restored, will be amply sufficient to sustain the sentence of condemnation passed upon this vessel and cargo in the court below. In that case, the learned judge was of opinion that it ought to appear in evidence, that prior to the sailing of that vessel to the port in blockade, from a distant port, the Spanish government at Madrid had been impressed with a distinct knowledge of the fact, so as to have enabled it to have prevented the sailing of *The Hoffnung* from the port in France, before a Prize Court could be induced to consider the property of the cargo fairly subject to condemnation. This, he was of opinion, was not the case; as sufficient time had not elapsed from the appearance of Admiral Collingwood's fleet off the port to communicate the state of Cadiz to the neutral. As to the property of that vessel, it was held, the neutral owner was entitled, in that case, to the utmost indulgence, from the peculiar hardship under which Swedish vessels were then placed, and nothing short of positive proof that the knowledge of the blockade had reached the master of this vessel, would be admitted as sufficient ground for condemnation. And in reverting to this judgment, it must be evident the peculiar circumstances of that voyage, and of the neu-

¹ 6 C. Robinson's Reports, 121.

tral owner's situation, were the principal reasons for restoring the property of both ship and cargo. The learned judge besides admitted, that there had not been sufficient information afforded to the court. In the present case all the facts are established, the time of the arrival of the blockading fleet precisely ascertained, and the existence of the blockade *de facto* proved, whilst the knowledge of these facts is brought home to the party, who commences his voyage from the point of danger. The established principles upon which it was, in that case admitted a Prize Court, would necessarily proceed to condemnation, are all applicable to the case before the court, and none of the peculiar features which protected that case, are to be discovered in the present.

Dallas and *Arnold*, for the claim. In referring to the case cited, it will be found, the leading principle of the judgment upon that occasion is peculiarly favorable to the claim here. It was held, that no reappearance of a blockading squadron, which had been compelled by a superior force to relinquish the blockade would renew it, nor were neutral nations bound to observe it, unless the same formalities of notice, &c., accompanied the renewal, as were usual in first imposing a blockade. That such a reappearance was, as to its legal effect, a blockade *de novo*. The striking feature of distinction in the cases is, that *The Hoffnung* sails from a distant port and attempts to enter the blockading port. The justification set up is the impossibility of her being acquainted with the renewal of the blockade. The prize in question sails from the blockaded port itself, and it is hence inferred she must have been aware of her danger. How stand the arguments urged in favor of the captor? They proceed altogether upon the assumption that the blockade was perfectly well known in [*259] Cadiz at the time this vessel set sail. If so, would not the attempt to escape have been made in the night? Or would not fraudulent papers have been put on board to conceal the time at which her lading had been completed? No such artifice appears to have been practiced. The fleet, it is true, appeared off the port; but, as was observed in the judgment on the case cited, that fleet might have been supposed to be merely one of observation. It was necessary to announce this blockade by proclamation, otherwise neutrals would not be bound to observe it. No notification, however, takes place; the prize continues to complete her cargo, and on the 21st July sets sail in the face of this fleet, and in the middle of the day. Previous to her sailing a remonstrance had been made by the neutral consuls to the British admiral, in consequence of his detaining some vessels sailing from that port. The causes of detention were even

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then unknown, and might have been various. The mere knowledge of the detention of these vessels, if even brought home to the master of this vessel, would have created no obligation on his part. No answer is received by the consuls to this remonstrance until two days after the sailing and capture of this vessel. Then it for the first time appears that it is the intention of his Majesty to maintain a rigorous blockade. Can this bind or affect a party already on the high seas? But to make out a case reference is made to the entry in the log of *The Paulina*, "supposed to be the blockading squadron;" this vague opinion of the writer is as ineffectual to prove their case as the surmise of the clerk of *The Colossus*, who presumes that it was believed in Cadiz a regular blockade had commenced. The doubts existing in the mind of the court in the case of *The Hoffnung*, are by no means cleared up in the present. * It is barely known the British [*260] squadron appeared off the port on a certain day. The same want of information complained of there exists here, and no distinction unfavorable to the present claim, can be drawn between the two cases.

The King's Advocate, in reply, observed, there was a very considerable difference in point of information between the two cases. In the case cited, it was only known by the court that Admiral Collingwood appeared off the port on a certain day. Here his intention was developed, and a great body of evidence corroborative of such intentions exhibited. From a list annexed to the communications which passed between the British commanders off the port, and the governor of Cadiz, containing the names of neutral vessels sailing to and from the port pursuant and subsequent to the instructions of the 5th of February, permitting a limited trade to ports of Spain, it appears that vessels had ceased to enter and sail as usual from the 6th of June. Those which sailed were for the most part detained, which circumstance gave rise to this correspondence. This document was introduced by the claimant himself from the papers in the case of *The Argus*, and was a strong proof of the fact being very generally known, since no vessels availed themselves after that period of any alleged misapprehension of the admiral's intention of being off that port.

JUDGMENT.

SIR WILLIAM GRANT. From the evidence adduced in this cause, originally or since invoked, there can be no doubt that the fact of the fleet having appeared off the harbor must have been known on the 10th of June, and was also considered to have arrived there for the purposes of blockade. From this period to *the [*261]

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shipment of the cargo, which was not completed until late in July, enough must have transpired to display the intention of that squadron. Various vessels were warned off. Previous to that time, in May and the early part of June, many American vessels entered, as appears by the list introduced amongst the papers of this cause. From the 6th of June no more vessels enter the port. This must have been a matter of notoriety and must have excited attention. With regard to the egress from those ports, some vessels sailed subsequent to that date; of these part were in ballast; others perhaps had a right to depart, as being included within the exceptions of the general order in favor of vessels laden before the knowledge of the blockade; upon this, however, we are not called upon now to decide; and some were actually captured, brought in for adjudication, and condemned, of whom there are now a few on our list. The general order did not issue until the 23d of June; yet we can draw no inference that the blockade was not as rigorously kept up from the time of the squadron's first appearing off the port; namely, on the eighth of the same month, as it was subsequent to the general order. We are of opinion it was not so much a blockade recommenced as a blockade *de novo*. From the general notoriety of the circumstances attending it the parties should have considered it as an actual blockade in full force and effect. We, therefore, affirm the sentence of the court below, condemning the property of the ship and cargo as lawful prize to the captors.

SENTENCE.

Pronounced against the appeal and affirmed the sentence appealed from.

The Nostra Signora de los Dolores. 1 Acton.

[* 262] * NOSTRA SIGNORA DE LOS DOLORES, Castaner, master.

March 29, 1810.

Joint capture. First question as to the inadmissibility of claim on the part of asserted joint captors, after final condemnation, without previously complying with the requisitions of the act of 45 Geo. III., s. 47, by payment of all expenses incurred by the condemnation. Second question as to the fact of sight at the time of capture. Claim of the asserted joint captor rejected.¹

A SPANISH vessel captured on the 11th November, 1805, was condemned in the Vice-Admiralty Court of Jamaica, as prize to his Majesty's schooner Pike on the 23d December following. On the 17th January, 1806, an allegation was given in that court on behalf of his Majesty's brig Goelan, pleading the fact of her being in sight at the time of the capture. A commission issued for examining witnesses on the part of the actual and asserted joint captor, and on rehearing the claim of The Goelan was admitted, from which decree the actual captor, Lieutenant M'Donald, appealed.

Arnold, for the respondent. The objections made to the claim of the brig Goelan are first, that the fact of her being in sight at the time of the capture is not clearly proved; and, secondly, upon a point of law which is deducible from the act of the 45th Geo. III, intituled, "An act for the encouragement of seamen, and for the better and more effectually manning his Majesty's navy during the present war," dated the 27th of June, 1805, which enacts in the forty-seventh section, "That no claim on behalf of any asserted joint captor shall be admitted before condemnation, unless security be given, at the time of entering the same, that the party shall contribute to the actual captor his proportion of all expense that shall attend the obtaining the adjudication, as well in the first instance as upon the appeal; and likewise his proportion of all * costs [* 263] and damages that may be awarded against the actual captor, on account of the seizure and detention; and after final condemnation, no allegation, setting forth such asserted interest, shall be admitted, unless the party shall have previously paid his proportion of all such expenses as shall have attended the obtaining such final condemnation; and unless he shall have shown sufficient cause to the court, why such claim was not asserted at or before the return of the monition."

¹ [For cases as to joint captures, see The Nordstern, 1 Acton, 128, note.]

On this latter clause of the section the objection in point of law is intended to be raised, inasmuch as the requisitions of the statute have not nor in fact could not from particular circumstances be complied with. Upon this part of the case it is only necessary to state, that the proper place and time for the actual captor to have availed himself of this objection would have been in the court below, when the allegation of Captain Ayscough as joint captor was there filed; even then he might have availed himself of this act, the spirit of which, from its title, appears not to have in contemplation to increase the difficulties which joint captors often labor under from the contrivances of interested persons or the unavoidable accidents dependent on nautical transactions. Many circumstances inseparable from the nature of a naval life, where parties must necessarily be subject to the command of superiors, whose duty it often is to prescribe to particular officers a line of duty or course of voyage from which they may not deviate, might render it impossible to comply in all cases of joint capture with the provisions of this act; but the same spirit

which dictated the act would naturally induce a Prize Court [*264] to make an exception in favor of a claim which had *only been protracted or deferred beyond the usual time by such unavoidable circumstances. On the question of sight, therefore, this case will most probably be decided. A variety of evidence is adduced in the papers of this cause to prove and disprove the fact. The deposition of the master of the prize, and also of the mate, states simply she was captured off Savannah La Mania, in Jamaica, by the schooner Pike, Lieutenant M'Donald, commander, no other vessel of war being in sight at the time of the capture. The reason of this mistake will appear from examining the evidence of the other more circumstantial witnesses. Of those for the joint captor, Chapman avers he was prize-master of *The Citizen*, which sailed under convoy of *The Goelan* on the day of the capture, saw *The Pike* and two other schooners from one to five o'clock in the afternoon; *The Pike* when first seen was about four miles distant, and close in shore; *The Goelan* nearly four leagues; the two other schooners running down before the wind. At four or five several guns were fired by one of the three schooners. At this time *The Goelan* had hoisted American colors, and he was ordered by Captain Ayscough to do the same, for the purpose of deceiving *The Pike*, which the captain told him he supposed to be an enemy. The schooner that fired the guns hoisted a blue English ensign in the afternoon. This evidence is corroborated in every particular by the mate of *The Citizen*, who adds, that he saw *The Pike* make the capture, previous to which Captain Ayscough had warned the *The Citizen* to keep clear of *The Pike*, and

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immediately went in pursuit of her. A sailor on board the prize deposes, he saw at the time of the capture a brig which he believes to be The Goelan, about two leagues to leeward; there was a ship to windward, and the schooner Pike between *both; [*265] the ship standing in shore, the brig and other schooner standing off. The brig's intention, he thinks by her manœuvres, was to cut off the schooner, and the commander of The Pike, after boarding the prize said, in broken Spanish, the brig was a companion of his. In this statement he is borne out by the evidence of two other Spanish sailors, who add, that in an hour and half's sailing they must have been alongside the brig, and have been captured by her, thinking her to be an American. The Pike's commander said, on taking possession of the prize, had she escaped him she must have been captured by the brig to leeward, his companion. The other witnesses for the actual captor, four in number, and all sailors on board the prize, principally confine their evidence as to the circumstance of The Pike's bearing a red ensign at her main peak, and aver they were only apprehensive of The Pike's capturing them; one, however, admits there were apprehensions entertained of the ship to windward. Upon the positive evidence, therefore, of five witnesses examined in behalf of the joint captor, and the admissions of the evidence on the opposite side, there can be little doubt the brig alluded to was The Goelan, and in sight at the time of capture, and hence entitled to share.

Carr, same side, was requested by the court to reserve his observations for the reply.

Adams and *Stephen* for the appellant. In appearing for the actual captor, we must in point of law derive considerable advantage from that situation. If our witnesses were merely negative, as has been stated, it would only be then that sort of evidence which the nature of our case will generally admit of. We are *not [*266] bound to establish a case; this is the duty of the counsel for the asserted joint captor; it remains for us to disprove it if established; if not, it falls by its own insufficiency to the ground. The *onus probandi* altogether lies on the claimant. It does not signify whether his claim is rebutted by direct or negative evidence. The strength of the actual captor's case is drawn from the weakness of the others; and if the respondent do not prove that the sight was evident and certain, there is an end of his case altogether. It was presumed that in the act of parliament quoted there was a substantive ground for excluding the respondent from availing himself of

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even a much stronger case than that now before the court. But upon this part of our case the court being of a different opinion, it becomes necessary to compare the conflicting evidence adduced by the parties, and decide upon the question of fact. In examining the evidence as to the fact, a disclosure takes place from the positive testimony of all who pretend to see the brig at the time of the chase, which gives rise to another question in point of law; for this vessel, all say, had American colors flying at the time, and was taken by these witnesses on board the prize for an American vessel. No intimidation, therefore, was given to the foe. Can, therefore, the claimant avail himself of the fact of sight, if even established, when he appears not to have contributed that assistance to the actual captor which forms one striking feature in the principle of law respecting sight, upon which a joint captor is entitled to share? Leaving, therefore, this question to the determination of the court, upon the fact of sight it is obvious that the council have rather endeavored to reason

inferentially that The Goelan must have been the brig men-
[* 267] tioned, and must * have been in sight from her situation,
than proved by positive evidence that she actually was so.

Scores, mate of The Citizen, admits his distance from The Goelan was twelve miles, yet speaks of having been warned by her to avoid the schooner, which proved to be The Pike; which vessel at the time had, he erroneously states, a blue flag flying during the chase. Is it possible a communication of the danger, which Captain Ayscough apprehended from The Pike's being so near The Citizen, could take place at the distance of so many miles? Would it have been consistent with his duty, having then the charge of the trade, to permit an enemy to chase a vessel in sight, and yet continue a distant course, leaving The Citizen in a situation of very great peril? Captain Ayscough, in his answers to the allegation of Lieutenant M'Donald, says the very reverse; stating he saw the capture made, but was not then certain whether the captor was The Pike or his Majesty's schooner Barracanta, both these schooners being so very like as not to be distinguishable at any distance. The four sailors on board the prize say The Pike's flag was red. In each part of his testimony Scores is discredited by positive evidence, or the impossibility of the occurrence to which he positively swears. All the witnesses who speak of The Pike's bearing say the capture was made close in shore, and to the eastward of a high point of land, projecting into the sea a considerable distance, called Pedro Bluff, over which no vessel on one side could see a vessel on the other. The course of The Goelan was to the westward of this point, far to leeward. Under these circumstances it is too much to infer, because

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The Goelan was within seeing distance, that she therefore had sight; for the intervention of this, or different other headlands which are upon that *coast, would have prevented [* 268] ships pursuing such different courses from having any sight whatever of each other; and the probability is, that the nearer such vessels were, the less chance there would be of their obtaining a mutual view. By referring to the chart, it must be admitted that vessels similarly situated as The Pike and Goelan are described at the time of capture, could not have been in sight of each other, but were intercepted by the intervention of the headland at the commencement even of the chase. Here it is necessary to observe upon the manner in which this claim came to be interposed, which is not a little extraordinary. The capture was made on the 11th November; the 24th the respondent arrived in Blue Fields Bay, where he continued three days; but, as he states, employed so actively in watering and refitting, that, notwithstanding his alleged knowledge of the capture, and having an interest in her condemnation, he could not spare time enough to send in his claim, though within a short distance of Kingston. He was then ignorant which of the schooners had made the capture; but being soon after acquainted, through the newspapers, that it was The Pike had captured the prize, and falling in with her on the 6th December, he went on board her, to ascertain from the appellant whether he would admit his claim, alleging his having been in sight at the time, which being denied, he requested to inspect The Pike's log, to see whether any entry had been made that day of The Goelan being in sight. The allegation of the appellant more fully details the transaction; adding that, when no such entry was found in the log, the respondent interrogated several of The Pike's crew, respecting the appearance of The Goelan during the chase, which they severally *denied. The appel- [* 269] lant requested leave to go with him on board The Goelan, and examine his logs, which was done; and no entry appeared of any guns having been fired by any ship in sight that day, (although six had been fired for the purpose of bringing the prize to,) nor was there any entry respecting the capture in question in the log of The Goelan. In examining the log of The Pike, the respondent displays a confidence in the regularity and precision of the evidence which he might extract from it; the deficiency of such evidence is, therefore, to be taken most decisively against him, and as the case for the asserted joint captor is incomplete, the appellant is solely entitled to the prize in question.

Carr, in reply, objected that the allegation of the appellant had

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been adduced as proof generally, whereas in the former adjudication two articles only, out of several, had been admitted, and that for the purpose of obtaining the answers of the respondent thereto. These referred merely to his being at anchor in Blue Fields Bay, and having made inquiries on board The Pike. Taking even the log as evidence, it did not appear that the Bluff intervened between these vessels. Not one of the appellant's witnesses say, that any interruption was occasioned by the intervention of this headland, though the whole of this case seemed to rest upon that fact's being established. The witnesses on board The Citizen spoke decidedly as to these different vessels being all seen by her, and within seeing distance of each other. The Spanish sailors on board the prize mentioned a brig in sight. These being disinterested persons, much reliance might be reposed upon their testimony; such, at [* 270] least, was *the usual practice of prize courts. And, from the body of evidence before the court, he considered his party could have no hesitation in resting the whole strength of his case on The Goelan's being the brig so repeatedly alluded to by most of the witnesses on either side.

JUDGMENT.

The court pronounced for the appeal, declared that the respondent had failed in substantiating his claim as joint captor, and condemned the vessel as prize to The Pike; but directed the respondent's expenses in both courts to be paid out of the proceeds.

PATAPSCO, Hall, master.

May 19, 1810.

National character of the settlements of the Isle of France and that of Batavia discussed. The captor's proofs of the illegality of a trade with these settlements, on the ground of their being of a colonial nature, where, in time of peace, neutrals were not permitted to trade generally, pronounced to be insufficient. Ship and cargo restored, the property appearing to belong as claimed. Captor's costs in both courts granted, in this and the remaining similar cases.

This was a leading case of several American vessels engaged in the same trade. The Patapsco sailed from Baltimore to Batavia, in the island of Java, where she procured a cargo of sugar, arrack, candy, and rattans, with which she cleared out for Baltimore, intend-

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ing to touch at the Isle of France for refreshments. On the part of the captors it was argued that, from the nature of the return cargo, which was peculiarly adapted for the Isle of France, and from other circumstances disclosed in evidence, her actual destination was for that island, where it was intended to dispose of this cargo, and, consequently, the asserted destination was false. A question necessarily arose, as to the legality of a neutral trade to and from these ports, and the national character of the settlements of Batavia and the Isle of France, which forms the principal part of the subsequent argument.

* The *King's Advocate*, for the captors. The nature of [*271]. the trade in which this vessel was engaged, at the time of the capture, is highly objectionable; inasmuch as the primary object of the neutral appears to have been to assist the trade of a Dutch settlement, by exporting from thence its staple commodities; its secondary, the importation of these commodities into a colony of the enemy. The facts of the case are strong, and require little comment. The Patapsco sailed under American colors from Baltimore, with iron, provisions, and dry goods, for Batavia, in the island of Java, from whence she took, in return, arrack, sugar, sugar candy, and rattans, with 19,700 Spanish dollars, with which the vessel was proceeding nominally for Baltimore, but, in fact, for the Isle of France, and was captured in the attempt to enter that island, about four leagues distant from the port, on the 1st of August, 1805. Proceedings were instituted against the vessel in the Vice-Admiralty Court at Columbo, in Ceylon, where she was condemned, as carrying on an illicit trade between Batavia, a colony of the Batavian government, and the Isle of France, a colony of the French government, in alliance with the Batavian *government.¹ [*272] In the depositions of the witnesses on board the prize,

¹ Extract from the printed case of the respondents.

“ The learned judge of the court below, in delivering his sentence, observed (among other things) as follows :

“ Considering that the reasons which the captured give for deviating into the Isle of France cannot be the true ones; that the excuse set up by them is the excuse which every American ship that ought not to go into the Isle of France makes for deviating into that island, if detained by his Majesty's cruisers; and that I am bound to consider, with the greatest caution, all excuses of this sort which are made by a neutral, after being caught in the very act of deviating into an enemy's port, I can have little hesitation in coming to the conclusion, that the excuse made by the American for going into the Isle of France is a mere pretext. The circumstance of this ship being found going into the Isle of France, although every paper on board of her

various inconsistencies are discoverable, which, in themselves, are calculated to excite suspicions of illegal intention on the [* 273] * part of the master, and fraudulent concealment in the correspondence between him and the owner, respecting the actual destination of this vessel on the return voyage. The master swears the ship's course was at all times directed to Baltimore, for which port she cleared out on the 10th July, until the 17th or 18th of the same month, when finding the ship was leaky, in bad weather, several of the ship's company in a sickly state, and apprehending he should be in want of water and provisions to prosecute his voyage, he determined to go to the Isle of France. After this determination, he continued to steer without deviation for that island, until the moment of capture.

pointed to Baltimore only; the erasure of the entry about the passenger for the Isle of France, although he was on board at the time she was detained; and the erasure of the entry which had been originally made in the log-book of a destination to the Isle of France, although it is evident it had always been her intention to go to the Isle of France, lead me to infer that the captain thought it necessary to conceal his intention of going into that port, knowing that the purpose for which he was going in was not a lawful one in time of war; that purpose, I think, is sufficiently explained by the nature of the cargo, which consists of rattans, arrack, loaf sugar, sugar candy, and 19,700 Spanish dollars, all articles which are declared by persons conversant in trade to be very well suited for the market of the Isle of France, though by no means to that of America, as appears by the instruction of the owner of the ship. It seems, therefore, to me the natural conclusion to be drawn, that the captain of the ship, having failed in procuring at Batavia a cargo fit for the American market, had taken on board at Batavia one fit for that of the Isle of France, intending to sell it there, and there again to purchase, with proceeds arising from the sale of it, and with the Spanish dollars which he had on board, such produce of the Isle of France as would make a suitable cargo for America. Upon these grounds, therefore, I come to the conclusion that the captain was proceeding from Batavia to the Isle of France with a cargo, the produce of the former place, for the purpose of selling it at the latter place, and there purchasing a cargo, the produce of the Isle of France, adapted to the American market, which I conceive to be carrying on a trade between the colony of one enemy and that of another enemy, which leads me to the third head—Is such a trade contrary to the general law of nations?

“Although my predecessor, Sir Edmund Carrington, has already declared it, in the case of *The Penman*, to be his opinion, that such a trade is contrary to the rule laid down by the general law of nations, I shall, nevertheless, feel it to be my duty to consider this point a little more in detail than he did, for the purpose of bringing before the Lords of Appeal, in the event of my judgment in this case being appealed from, the various documents which are necessary to enable their lordships to form a conclusive opinion on the most important question of prize law that has ever been agitated in the East Indies.

“In order to enable me to decide this question, I shall consider separately all the Dutch and all the French colonial regulations on this subject, which are applicable to Batavia and to the Isle of France.”

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The outward cargo was consigned to the master, as appears by invoice; and both outward and return cargo are described as the property of an American merchant. The master states there was no passenger on board the ship. There are, however, two entries in the log of this vessel which disprove the testimony of the master respecting this fact, and also his alleged intention to return to Baltimore. The first of these entries is, "Mr. Ch. F. Lepontouin came on board for his passage to the Isle of France." The second [*274] appears to have been made after the ship had left the road of Batavia and proceeded to sea; "Ship Patapsco, from Batavia towards the Isle of France." These three last words have been attempted to be erased, the pen has been thrice drawn through them, and the word "Baltimore," inserted beneath them. Two such entries as these are tolerably strong proof that the original intention of the master, previous to setting sail from Batavia, was for the Isle of France, and by the clumsy contrivance of substituting one destination for another, after he had commenced the voyage, we may fairly infer he was aware the avowal of his intended voyage to the French colony would be attended with danger, and that such a trade was illegal. There is, therefore, upon the facts of this case, sufficient to induce the court to pronounce a sentence confirming the condemnation of this vessel, independent altogether of the question of the description or national and relative character of the ports between which this trade was attempted to be carried on. For, in the cases of *The Penman*,¹ and *Amsterdam Packet*,² where the nature of the trade was nearly the same, without any reference to the national character of these ports, your lordships lately decided upon the fraudulent circumstances, and the want of integrity disclosed in the ship's papers and examinations, and proceeded to condemnation upon that ground alone. The same concealment, equivocation, fraud, and insincerity, characterize the present case, and must, therefore, lead to a similar adjudication.

Upon the national character or relation in which the ports of Batavia and the Isle of France may be supposed to stand to the respective states of which they may be *considered a part, [*275] this court has never yet come to any decision; when the question might be considered to be in some measure before the court, by the arguments of counsel, in a late instance, your lordships were, notwithstanding, satisfied with an investigation of facts, and founded

¹ *Penman*, Coffin, Lords, February 20, 1809.

² *Amsterdam Packet*, Smith, Lords, November 12, 1807.

your decision upon those facts. Indeed, it appears to be admitted by all, that the nature of these settlements has never yet been ascertained by any judicial determinations upon the subject in the various courts of judicature established in this country for the investigation of civil or national rights. In the absence of all authority, therefore, the most cautious reservation upon this subject has distinguished the court and counsel wherever the question of national character might by possibility have been raised. In an inquiry of such serious importance to the mercantile world in general, it will be the duty of the court to examine with more than ordinary strictness into the nature of the connection subsisting between these settlements and the European powers to whose dominion they are subject, and into the history of their primary establishment and subsequent advancement as strict and close settlements, subject to colonial restrictions in trade, and regulated by an exclusive system of policy with respect to other nations. How far the necessities of war may have constrained these places to relax that system on their own account, will be perfectly immaterial in the present inquiry. And it will, therefore, be attended with least inconvenience to consider these ports as in the situation in which they were in the year 1793, or at the commencement of the present war. A very concise view of the laws enacted by France with reference to the Isle of France, will be sufficient to establish the position advanced. In the year 1712, during the reign of Louis the XIVth, the island [*276] was *taken possession of by a small colony from the French settlements of Madagascar. The general character given to this establishment subsequently, was that of a close and colonial nature. The charter granted to the French company trading to the east, exclusively vested in that company the trade thither, and made it penal in others to trade beyond the Cape of Good Hope. And it is stated by political authorities of distinction, and, amongst others, Mr. Peuchet, a member of the Institute, for the information of the French government, that these regulations had been selected and taken from a similar charter granted to the English company trading to the east; a circumstance which will sufficiently illustrate the necessarily restricted nature of its commerce. Affairs continued in this state until the year 1769, when the French company was dissolved, and that trade thrown open. The island was ceded to the French crown, and had been, in the year 1764, resumed by an *arret* of the French government, which is mentioned in the history of the regulations of the Isle of France. It thus experienced a change, no doubt, in some respects, but there is no reason afforded to infer this settlement was, from that period of time, excluded from the general regulation, as applied to their other Indian possessions; but it appears to have

always continued as a colony subject to peculiar restrictions in its trade. In the year 1787, we find it asserted, by some writers, that Port Louis, a particular port in that island, is made a free port. And it is mentioned in a work of Mr. Arnold, in 1791, that the Isle of France was then a free port to all European ships trading to the East Indies. In thus tracing the history of its connection with the mother country, it must be apparent, that nothing has been suppressed, either in the way of fact or authority, which can throw any light upon the *matter under investigation, however unfavor- [* 277] ably, even, some of these may be considered to bear upon the position contended for on behalf of the captors. What degree of credit such authorities deserve, will be a subject for the consideration of the court. These last-mentioned passages alone, seem to be the foundation of the contrary position, that the Isle of France has been, for a considerable time, a free port. Upon the authorities of this description, it would be indeed too much to concede, that a total change had taken place in the original constitution and frame of this settlement, especially as we may collect from a manifesto or declaration by the national convention of France, published not very many years since, evidently with reference to this, in common with other colonial establishments of France, that it was never in the contemplation of the French government to open the trade to these places to ships or subjects of other states. Every interference on the part of other nations in the trade between the colonies and possessions of France and the mother country, is interdicted under pain of confiscation of property, and the severest penalties and forfeitures. This famous French Navigation Act,¹ of the 21st of September,

¹ Law containing Navigation Act of the twenty-first of September, one thousand seven hundred and ninety-three.

The national convention, after having heard the report of the committee of public safety, decrees,

Article I. The treaties of navigation and commerce subsisting between France and the powers with which she is at peace, shall be executed according to their form and tenor, without any change being made therein by the present decree.

II. After the first of January one thousand seven hundred and ninety-four, no vessel shall be reputed French, nor have any right to the privileges of French vessels, if she has not been built in France, or in the colonies, or other possessions of France, or declared good prize taken from the enemy, or confiscated for contravention of the laws of the republic, if she does not entirely belong to Frenchmen, and if the officers and three fourths of the crew are not French.

III. No foreign commodities, productions, or merchandise, shall be imported into France from the colonies and possessions of France, unless direct by French vessels, or belonging to the inhabitants of the country, of the growth, produce, or manufacture, or of the usual ports of sale and first exportation, the officers and three fourths of the

[* 278] 1793, * was passed at the time when it was most natural to suppose that if any liberality of principle or of politics, in respect of other states, could have been avowed consistently [* 279] with the national interest, there were the * strongest reasons to induce such an avowal. But at this very moment, it is remarkable, the convention, speaking the sense of the country, interdict all trade to these places except in French bottoms, or those of the settlements themselves. Nothing can be a more satisfactory proof that this had long been the system upon which France had always acted with regard to her foreign relations, insomuch so, that even when her form of government was completely changed, and every thing else which had assumed the appearance of firmness and stability, had been overwhelmed by the spirit of revolutionary innovation; the same jealousy of foreigners, and restrictive spirit of monopoly, distinguished the decrees of the new government. From comparing the state of this island with that of the West India islands, it must also be pronounced to be a colony; and it is remarkable, that although those islands were opened to the Americans, they never ceased to be considered colonies in the strictest sense of the term.

foreign crews being of the country whereof the vessel wears the flag, the whole under pain of confiscation of the ships and cargo, and forfeiture of three thousand livres in *solido*, and personal imprisonment on the part of the owners, consignees, and agents of the ships and cargo, captain and lieutenant.

IV. It shall not be competent to foreign vessels to transport from one French port to another French port any commodities, productions, or merchandise, of the growth, produce, or manufacture of France, or of the colonies or possessions of France, under the penalties contained in Article III.

V. The tariff of the national customs shall be redrawn and combined with the Navigation Act and the decree abolishing the customs between France and the colonies.

VI. The present decree shall be forthwith solemnly promulgated in all the commercial ports and towns of the republic, and notified by the minister for foreign affairs to the powers with which the French nation is at peace.

Folio 150, § 13.

Law containing provisions relative to the act of navigation. 27th Vendemaire, Year II.

The national convention, after having heard the report of its commissioners of the customs, decree as follows:—

Article I.—Manufactured Spanish or English wool, raw silk, gold or silver specie, cochineal, indigo, gold or silver jewels, whereof the materials are worth at least three times the price of the workmanship and appendages, are not comprehended in the prohibition of indirect importation, decreed by the act of navigation.

II.—In time of war French or neutral vessels may import indirectly from a neutral or enemy's port the produce or merchandise of an enemy's country, if there be no general or partial prohibition of the produce and merchandise of the enemy's country.

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BY THE COURT.

SIR W. SCOTT. That permission in favor of Americans was confined to a trade in certain articles, * and was subject [* 280] to several restrictions. To support the position you contend for, it would perhaps be necessary to show that the same restrictive regulations were still maintained at the Isle of France after the period when it is supposed its trade was opened to foreign vessels.

The conditions upon which this permission to trade to the East was granted to America by France would in themselves be a strong ground of objection with a British court of prize to receive any claim made on the part of Americans engaged in such a trade. These implied conditions are to be collected from the writings of American politicians. In the year 1793, a political work of some ability, entitled *Camillus*, was published in America, which in alluding to the trade carried on by Americans to the Isle of France and the east, observes, By the late treaty it must be acknowledged we obtained from Holland and France the opening of their East Indian trade, and this because from the critical state of affairs they found themselves unable to carry on that trade any longer. From the confession, therefore, of Americans themselves, it is clear this court cannot receive the claim of these parties with any degree of favor. The trade in which they have been engaged has been taken up when it was no longer practicable for the enemy to carry it on, and they have divested themselves of the neutral character by endeavoring to facilitate the trade of the enemy. A temporary concession or permission to trade with these ports during a period of war cannot for a moment be supposed to have the effect of divesting them of their colonial character. It is fair to conclude, that as they were indebted to the existence of war for this * permissive trade, so at its [* 281] conclusion they would also be deprived of it altogether, and the trade would become as restricted as ever. In the additional appendix of *The Liberty*, one of the cases on this list, is to be found a comment upon the French Navigation Act, extracted from the writings of Mr Peuchet, who has before been mentioned as speaking with authority upon this subject, which strongly marks the disposition of the French government to be most decidedly averse to change the ancient system restricting the trade of neutrals to the colonies or dependencies of France.¹ In speaking * also of the [* 282]

¹ Extract from the papers of *The Liberty*.

We think ourselves obliged to remind the owners of ships of the regulations of the

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probable existence of a new India company, he considers at some length whether it would be expedient or politic to establish [* 283] a free port in the Isle of * France. When a person of his description is discovered speaking of the policy of a proba-

act of navigation now in force, and which is of the greatest importance for them to be acquainted with, in order to prevent any kind of error in the equipment, or on the arrival of their ships in the ports of the republic.

This is not the place to examine to what extent an act of navigation may be useful to the commerce of France, nor if that which the convention decreed in September, 1793, contains every desirable condition ; our object is only to make known the principal articles, those with which it is most important for the owners of ships and merchants to be acquainted.

The act of navigation, passed on the 21st of September, 1793, like all laws of the same kind, has two objects in view, 1st, To prevent the importation of foreign goods and merchandises in ships of a country of which these goods are not the growth. 2d, To prevent all foreign shipping from carrying goods from one part of the republic to another.

The first of these regulations is contained in the third article of the act of navigation. It prohibits the importation into France, or into any of its possessions, of foreign productions, or merchandise, except in French ships or in ships belonging to the inhabitants of the country where the said provisions, productions, or merchandise, shall grow or have been manufactured, or from the ordinary port of sale and first exportation, and the officers and three fourths of the mariners shall be of the nation whose flag-ship shall bear, on penalty of confiscation of ship and cargo, and of 3,000 francs additional, a penalty on the proprietors, consignees, agents, captains, and lieutenants of such ships.

From this prohibition are excepted wool unwrought, from Spain or England, raw silk, cochineal, gold and silver, toys of gold and silver, the metal of which is worth at least three times the workmanship. Law of the 19th of October, 1794.

The same law likewise excepts all which shall be brought in a foreign ship on account of government, from whatever place the productions and merchandise laden on board the ship shall come.

It also excepts, during the time of war only, goods and merchandise which shall come even from an enemy's country, when the same shall not be prohibited.

They can, therefore, no longer be imported into France but in French or English ships, and, of the latter, the officers and three fourths of the mariners must be English.

The fourth article of the act of navigation, of the 21st September, 1793, prohibits foreign ships from carrying from one part of France to another any goods, under the same penalties pronounced against indirect importations.

The prohibition is not to extend to vessels freighted on account of the republic.

It has also been suspended during the late war in favor of all neutrals.

The second article of the committees of public safety, of commerce, and of marine, of the 25th January, in the year 1795, enacts,

That it shall be permitted to all French merchants to employ, during the present war, neutral ships to transport from one part of the republic to another, the goods and merchandise of France.

These permissions were granted indifferently either by the minister of the marine or

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ble measure, it is not too much to infer that no such measure had been at that time adopted by his government. Mr. Peuchet wrote in the year 1802, and held out these things to all the maritime world navigating those seas. Although this act, like many other revolutionary decrees, was overruled after it had been discovered to be productive of great inconvenience; yet there appeared no disposition to render the trade to France and its dependencies any further open to other nations than merely so far as it was absolutely necessary for their convenience, or perhaps for the very existence of the latter. The distinction, therefore, attempted to be drawn between the Isle of France and other French possessions abroad, is without foundation. It cannot be considered a free port, but must be taken as comprised within the scope of the Navigation Act, which makes it illegal for neutrals to carry to the colonies any other produce than that of France, or to convey thence any other than colonial produce. Upon the established principle of national law, which will not permit a neutral to enjoy a trade for the advantage * of the [* 284] enemy, and which through the distress of that enemy alone they are permitted to exercise; your lordships even upon this part of the case cannot but consider the judgment of the court below sustainable upon the soundest principles.

The next part of the case refers to the *portus a quo*, in examining which it will be necessary to inspect with some minuteness the history of the settlement of Batavia, from which port this homeward voyage commenced. This settlement in the island of Java was established by the Dutch so early as the year 1619, and shortly after was converted into a source of immense wealth and national aggrandisement. A charter was granted by the government of Holland in the year 1602, to merchants trading to the east, under the title of the Dutch East India Company. This charter was subsequently renewed at the expiration of twenty years, when the trade thither was found so valuable, and more especially to this and the other Indian

of the interior, they were transmitted to the administration of the customs, who gave notice thereof to their officers; the latter were not to pay any attention to such regulation unless it came to them through that channel.

The neutral ships, thus authorized to become coasters, paid only the duties imposed on French ships.

This permission to employ neutral vessels in coasting, having been granted only to protect our commerce from capture, it now becomes useless, it, therefore, has ceased with the war.

This remark is important, to prevent those contests which might arise between the owners, freighters, and masters of foreign ships, and the officers of the customs, and we have inserted them as essential to be known for the tranquility of commerce.

islands, that different renewals were granted as soon as the old terms had severally expired. The terms of these charters were extremely absolute and exclusive, prohibiting and proscribing any trade by other nations to these settlements under the most severe penalties and forfeitures. This exclusive system continued to be enforced with peculiar and unabating rigor for a whole century, during which the trade in spices and other articles was carried on with unparalleled success and emolument. To maintain this monopoly the Dutch were compelled to have recourse to such arbitrary measures and sanguinary conflicts, that the company is said to have written its history in characters of blood. From this period it appears to have been peculiarly the wish, as it undoubtedly was the height [*285] *of policy to maintain themselves in the exclusive enjoyment of this trade. And so early as the year 1619 we find, in a treaty concluded on the 7th of July between England and Holland, the two East India Companies of England and Holland mutually agree to consider any trade, except that by the companies, carried on to their possessions, as an highly censurable and criminal interference in a trade denominated exclusively their own. It was extremely natural these companies should wish to monopolize this trade, which was now discovered to be most lucrative, and should, therefore, make every effort to obtain a sanction for this monopoly from their respective governments. They did so and succeeded ; but not content with this, by the treaty alluded to, they strengthened this sanction in their own favor as against all the world beside. This has been part of the policy of all nations having settlements and colonies abroad. By the fifth article of the treaty of Munster, we find it was agreed on the part of Spain and the states of Holland, that neither should interfere with the other in their respective trades to the East and West Indies. In the treaty between Holland and the United States of America, shortly after the declaration of their independence, it was expressly stipulated then that no American subjects should interfere in the commercial intercourse of Holland with her settlements. No hostility was then in contemplation, and as there were no reasons to avow any liberality of policy, the system of exclusion and monopoly, in the strictest sense, was distinctly avowed. The same appears to have actuated in a peculiar degree the French government in passing the Navigation Act.

That this exclusive system was acted upon by the Dutch is to be collected from yet later authorities. In the *Bibliothèque* [*286] *Commerciale*, Mr. Peuchet, speaking of * the settlements in the Molucca islands and Java, observes, the trade thither is subjected to rigorous restrictions by the Dutch government, which

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will not permit any interference in it by Europeans. This opinion is confirmed by referring to the judgment of the High Court of Admiralty delivered in the case of *The Rendsborg*,¹ where a contract had been entered into by the Dutch East India Company to provide a Danish mercantile house with the valuable produce of the settlement of Batavia on very advantageous terms, and at reduced prices, in which it appeared to be the object of the company to clothe the neutral merchants with all the facilities and powers of the company itself to enable him to transport a great proportion of the produce of the colony to Europe under the sanction of its neutral character, and thus benefit the colony by relieving it from an accumulation of commodities which it was found impossible the company could otherwise dispose of to advantage. The judge of the High Court of Admiralty, in prefacing his judgment on that case, observes, "Into the ordinary state of the trade at the settlement of Batavia, which has been occasionally disputed in this court, I have made particular inquiries, and I have satisfied myself by resort to what I consider as means of authentic information. In the accounts given in books it is represented that Europeans are not usually admitted as merchants except Spaniards, who have commodities to barter, and have obtained particular privileges. With respect to other nations, Abbe Raynal, on whose account, not confirmed by other testimony, I should not, perhaps, venture absolutely to rely, says, 'that English vessels are seen there more frequently than those of other countries; they touch there in their voyage from Europe to China, under the pretence of obtaining water, but the trade *carried on by them [*287] is a secret and clandestine trade.' These accounts, confirmed from other quarters, satisfy me that the trade of that settlement is permitted to foreign nations with a very limited indulgence indeed." These observations will be found extremely applicable to the case of some vessels belonging to other countries, mentioned in the papers of this cause, but which the Court of Seventeen regret should have been permitted to carry on an illicit trade upon the coast of Java, with a remonstrance on the part of the company, complaining of the want of fidelity in those to whom the management of their concerns in that island had been committed, by permitting this traffic to be connived at, to the manifest injury of the company, and even threatening its total dissolution.² But were it even proved that a partial permission had been given, or rather connived at by the company, to a particular nation in amity, it can never be supposed to

¹ 4 Rob. Rep. 132.

² See Appendix.

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extend the length of establishing any right to trade with these restricted possessions. It is from the express acts of the Dutch government that its intention must be known and collected. To support a case for the appellants here, it cannot be maintained that the Americans lay any claim to a permissive trade during peace. They cannot, then, have any during war, if it is not secured to them by Holland during peace as a matter of right, an American owner cannot avail himself of it against a British cruiser in time of war between Great Britain and Holland. Several communications took place between the Court of Seventeen, the Dutch governor-general in India, and the minister plenipotentiary of Holland, residing in the American states, relative to the increasing trade of the Americans on the coast, which are extremely explicit in avowing the

[*288] *dissatisfaction felt by the company, and the apprehensions entertained lest this illegal trade may terminate in the extinction of the company. A secret letter of the Dutch Court of Directors to the supreme government of Batavia on this subject requires "that they avoid facilitating the navigation of such American vessels to India and their trade there, charging them that they suggest, by their first opportunity, what the necessary means are which may be adopted to discourage them from such navigation." By all these documents it is pretty satisfactorily proved, that no exception in favor of neutral vessels was ever in contemplation of the company; but on the contrary, all foreigners were excluded from legally trading with these settlements, and those who persevered in the trade were considered as smugglers, up to the very period of the war. On the commencement of the war all things were disorganized and changed from their original state, insomuch so, that the Court of Admiralty appeared indisposed to interfere with the question at present under discussion. There has been invoked into the case of *The Liberty*, from the papers of *The Rapid*, (a cause decided in the High Court of Admiralty,) a secret and confidential paper from Mr. Van Polanen, an agent of the Dutch government of India, to the minister of marine and colonies, residing at Amsterdam, inclosing a copy of a despatch transmitted by him to the governor-general of Dutch India. By this representation, which is very voluminous, it appears the object of the Batavian government in sending out Mr. Polanen, who seems to have been armed with very comprehensive and unusual powers, was to enter into a negotiation with merchants residing in America, to engage them in a trade with the Dutch settlements in India, particularly in *Java and the Moluccas. The writer, who appears to be perfectly qualified by his information and acuteness for such a mission, recites the motives which had induced

the company to engage the Americans in this trade, which originated in the capture and burning of the major part of the shipping belonging to the inhabitants of Java; the weak state of its defensive force, the augmentation of the difficulties and risks with which the Eastern factories have hitherto been supplied with money and stores by the Batavian government; these and other increasing obstacles had induced the governor to believe the only means of averting the danger to which the factories would be exposed, consisted in laying open the trade with those factories, but only so far as it had become necessary to the annual supply of those factories with specie and stores, which could only be effected by contract in America. To effect this desirable object the writer observes, it would be necessary to hold out strong inducements to merchants to purchase the overstocked commodities of those factories; he, therefore, proposes that the price of coffee at Java, and cloves, nutmegs, and mace, at Amboyna, should be reduced considerably. Speaking of the prospect there was of the Americans entering into the trade, he observes, "a considerable difference must take place in effecting insurances to Batavia and Amboyna, which arose chiefly because the English may, in some measure, regard the navigation from hence to Batavia as a customary voyage in time of peace, at least, so they maintain here." This latter part seems to contain a sneer at the ignorance and credulity of Great Britain and America upon this topic, and leads us to infer that he and the governor-general, with whom he communicates, knew much better, and that the *fact was not so. He [*290] adds, "but the navigation to the Moluccas is so universally known never to have been permitted by the Dutch government that one must expect that an American vessel intercepted in that trade by an English privateer, would be liable to confiscation. On this principle it is also, that the insurance from hence to Sourabaya¹ is higher than to Batavia, though not in the proportion of that from hence to Amboyna." After stating that he had concluded a contract upon these principles and stipulations, he assures the governor-general there are good reasons to believe the expedition will be attended with great benefit to the Dutch factories and establishments in the East, that the American vessels were of a peculiar construction, fitted to elude and outsail any British cruisers in those seas, some of which were well armed and amply provided with means of defence. This letter would, in the absence of all other information, be decisive of the general policy of those establishments, and

¹ One of the ports to which this expedition was expected to be destined.

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so perfectly aware was the owner of The Patapsco of the close and jealous spirit of the Dutch government there, that by his letter of instructions to the master he appears to have even entertained doubts whether the master would be permitted to land any goods or receive a cargo in return, providing for this emergency by pointing out to him the Isle of France in the last resort. In this letter he refers darkly to some nameless services, whereby a vessel engaged in trading there had been preserved to its owners, but which it is probable, from the manner in which mention is made

[* 291] * of the circumstance, that it was a service which, how-

ever it might appear praiseworthy to the Dutch government, must be looked upon, from that very circumstance, as unfavorable to his claim in this court. The passage runs thus : — " In case there is any difficulty in permitting you to trade and to get a return cargo, you must petition, stating that your owner was one of the owners of the ships Samuel Smith and Rebecca, and that by the integrity of the owners of the same Samuel Smith her cargo was preserved to its owners ; that I, as owner of the ships Smallwood, Hebe, and Ann, have constantly been sending large sums to Batavia in dollars. In the unfortunate event of a total refusal of your trading at Batavia, I know nothing you have left but to go to the Isle of France ; but this you must avoid ; it would be next to a total loss." Here the master is detected avowing his unneutral-like conduct as a motive for the condescension of the Dutch government, and also his conviction of the doubtful and unauthorized nature of the trade in which he had engaged. The letter of Mr. Polanen discovers the sole reason which can be given for the novel policy of the Dutch government, in making these special concessions under agreement to a particular set of men ; namely, the dangers to which these colonies were exposed, from the activity and vigilance of the belligerent. The American merchant is thus discovered interposing in the war, and availing himself of the neutral character to transact the disgraceful drudgery of a monopolizing company ; whilst, on the other hand, he takes advantage of special concessions from the company to exempt him from the consequences attendant on interfering in an interdicted trade. Thus the national honor and character

[* 292] is forgotten, or rather converted into an engine * of hostility. The court cannot permit this trade to pass without its deserved censure and punishment, when the most deliberate fraud, artifice, and connivance have been employed, in order to draw merchants to trade with these settlements, not in the genuine character of neutrals, as to a free, open traffic, but to do hostile and illegal acts, in violation of all public faith, for the sake of obtaining the trade

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itself, and to convert their diligence to the support of a colony of the enemy.

The Attorney-General. Two questions arise upon the present case, as to the legality of the trade in which this vessel was engaged: the first, could she have prosecuted this trade during a period of peace, from the Isle of France? and, secondly, could she, during a peace, have taken this cargo from Batavia? To both the questions there must be given a direct negative. The trade, in the first instance, is contrary to the express law of France respecting its colonies; in the second, it is contrary to the laws of Holland with respect to Batavia. Viewing the case as if this vessel had cleared out for the Isle of France, and had set sail thither, this avowal of her true destination would not have legalized the voyage. The colonial laws of the various nations having colonies abroad were, doubtless, intended to regulate all commercial intercourse with their foreign possessions. There is no distinction between sailing to the colonies of those countries, whether situated in the East or West Indies. The reasons which induce any nation to interdict any trade to the colonies in the west, by foreign ships, must be equally applicable to the case of their colonies in the east. In point of fact, no such distinction has ever existed with respect * to [* 293] the settlements in India; but from various causes it has happened that a more peculiarly jealous policy has marked European nations, with respect to their possessions in the east, than anywhere else. The principle upon which this court must here decide has been distinctly laid down, repeatedly recognized, and is equally applicable to the case of a trade with the Isle of France or with Batavia. The laws of war will not permit the enemy to have recourse to any relaxation or modification of previously existing regulations, so as to avail himself of a neutral trade in those articles not permitted neutrals to traffic in during a period of peace, when no apprehensions of capture were entertained. The case of this vessel, so far as respects the Isle of France, is comprised within the third article of the French Navigation Act; and there cannot arise a doubt that, upon that article, any vessel carrying on a similar trade to that island during peace would be condemned by a French tribunal.

BY THE COURT.

According to that article a Dutch ship, freighted with these commodities, might have entered the Isle of France without incurring any danger; as these articles are the growth of the Dutch colony,

from whence they might immediately be imported into the French colony.

Ever since that decree the war has continued, with the exception of a few months during the short peace. If it were even satisfactorily established that the French government had relaxed its decrees during that peace, it would be necessary, in order to derive here any benefit from such relaxation, that the claimants should show it did not originate with a view to a future war at a period not [* 294] very distant. From the *artful silence of Mr. Polanen, in his negotiation with the American merchants, it is evident the same strictness prevailed in the ordinary trade of Batavia. Had not this strictness in fact existed, he who seems so anxious to drive a bargain for his government would have said at once, by way of inducement, — “The island of Java, at least, is open; you need not be apprehensive of trading thither; it is a customary trade for neutrals.” This he avoids, and avails himself of the general misunderstanding on that head, and leaves them to extricate themselves from any unpleasant consequences which might arise from their ignorance. The great object was the relief of the colonies, which being effected, he was perfectly at ease as to the fate of those who had been instrumental in its accomplishment.

Adams, for the claim. No question arising as to the property in the ship and cargo, there can be no pretext for requiring further proof in this case. The proof, also, of a legal intention in the master in entering the Isle of France is detailed most satisfactorily in the papers and correspondence produced in the cause. The letter of instructions proves a *bonâ fide* intention, on the part of the owner, that the vessel should return direct, with a cargo adapted to Baltimore. The master having delayed some time, and made every possible endeavor to obtain the merchandise required, informs his owner they cannot be procured; adding, — “I am now taking in arrack and clayed sugars; this is like doing nothing, because it would not take more than one third of my funds; but what better can I do? I cannot think of waiting four or five months; as the company’s last answer was to me, — If I could wait that length of time, [* 295] * they could not promise me a cargo of sugar and coffee.”

“At the Isle of France no coffee is to be had; so that I don’t think I shall stop there without I am short handed, and I am not certain but that will be the case, as I have two or three sick men at present; one in the hospital, I expect to lose, and am not very well myself.” Here the intention of calling at the Isle of France,

and even of stopping, under particular circumstances, for some time, is unequivocally avowed. In his next letter, fifteen days after, he says:—"I shall get under weigh to-morrow, bound for Baltimore; but in my present situation expect to stop at the Isle of France to recruit, several being sick on board. Should we not stop at the Isle, I shall stop at St. Helena, for water and refreshments. Your orders were, if I could not do any thing here to go to the Isle of France; but I learn coffee there is from twenty to twenty-two dollars, and very little to be had at that." Throughout his stay at Batavia, there appears much fluctuation in the mind of the master whether he should refresh in one place or the other. It was not extraordinary, for the event altogether depended upon a contingency. The circumstance of the destination in the log being originally described as for the Isle of France, must be imputed to a mere mistake of the writer; for when afterwards it comes into the proper hands the error is corrected, by simply drawing the pen through the words Isle of France, and subscribing Baltimore. This was indeed unwise, if a fraud was intended; for such an awkward mode of executing it could not fail to draw the attention of a British cruiser, and stamp the conduct of the master with a suspicion that he had very cogent reasons for the alteration made. Erasure would have removed the difficulty and risk; but integrity * of intention naturally inspires [* 296] confidence. Fraud and candor are seldom features of the same enterprise. The means to which an artful man would have instantly resorted, to conceal his fraudulent design, are here deemed unnecessary to give a color to this transaction, and the alteration is not attempted to be concealed. In referring to the cases adduced to illustrate the argument for the captors, it is worthy of observation that, in the cases of *The Penman* and *The Amsterdam Packet*, a reference was distinctly made to a fraud detected in the arrangement for the outward voyage, which, it was contended in argument, should affect the homeward voyage. This question and the present are perfectly distinct, and bear no analogy to each other. Whilst we avow explicitly the nature of this voyage and the intention to enter this island, the possible imputation of fraud is rebutted. If, then, it should appear ultimately to this court that there existed no illegality in the trade directly to and from these islands, how can the interests of this owner by possibility be affected? The letter of instructions to the master is perfectly like that of an owner, cautious, yet adapted to circumstances. The departure from these instructions is naturally accounted for by the subsequent information received by the master upon the subject; coffee was not to be procured at Batavia at all, nor at the Isle, except at an enormous price. A cargo must be procured.

Sugar, arrack, and canes, are not improper articles for an American market. Little, indeed, has been made of the asserted concealment of the real character of the passenger, Mr. Lepontouin. The sickly state of the crew rendered his passage in that vessel peculiarly eligible. He was desirous to work his passage, and without [*297] ascertaining with precision *where he might be landed in the course of the voyage, the master felt it to his advantage to embrace his offer. The facts, then, of this case are all fair.

As to the question of national character, it is without doubt a popular topic, and much has been urged upon it. It has been assumed as the great basis of the argument, that these possessions are to be considered colonies. This is not the fact, and, therefore, it is unfair to reason upon it. There certainly is no charm in the term itself. Colonization merely signifies a remotion of part of a nation's population to a distant settlement. This description does not apply, strictly speaking, to the possessions of Europeans in either the east or west, but more particularly to those in the East Indies. The sole question for your lordships' attention is this: Does the trade appear to be an interdicted trade? Have there hitherto been adopted positive and express regulations on the part of these respective governments in Europe, amounting to a total prohibition of any trade to or from these possessions except in bottoms of the mother country, or of the colony itself? Such is nearly the case in the colonies in the West Indies; but no such regulations of government have ever been adopted in the east. The privileges of the English East India Company amount merely to a monopoly in its favor against our own subjects. This is the foundation of the policy of eastern monopoly in all cases. No inference drawn from the state of foreign commerce in islands in the West Indies can be at all applicable to that in the settlements of these European nations in the east. The situation of the one is directly the reverse of that of the other. The trade of all these settlements in the east, of whatever European nation, is shut up in particular companies to the exclusion [*298] of *any others of their fellow subjects, and which must, therefore, derive their rights from municipal regulations alone.

Whilst America has remonstrated with this country upon other interdictions in its general trade, we have said, is not the trade to the East Indies and Batavia open to you? It has been almost avowed by authorized persons on different occasions. In the correspondence between Mr. Smith and Mr. Jackson this is recognized. The American government has lately published the conference of Mr. Pinckney with Canning, in which it is asserted that the question of Bata-

via had been given up. This it is very probable may be the case. The Batavian government might have found out the American trade thither to have been considerable, even during the period when their jealousy was most alive, and therefore, they gave it up. In that case it would seem the courts of prize in this country are now required to act in one way, while the government itself will be acting in the reverse. The lateness of this correspondence leaves us in doubt how far it may be proper to argue upon those topics, which are probably, ere this, happily discussed and finally arranged. Taking into consideration the distressed state of America, restricted as she is by turns from almost all the ports of Europe, it is to be hoped that upon the proofs now adduced, and even if the question only appeared dubious, your lordships would be induced to consider that we had sufficiently succeeded in establishing our case. To maintain that if America had even traded with the settlement in Java during the short peace, it would in no wise sanction their present trade thither, is a position extremely objectionable. Enough has *already fall- [* 299] en from the most competent authorities to discountenance the principle attempted to be laid down, that a peace is not to be taken as a peace with all its natural consequences. The shortness of the peace cannot deprive it of its essential attributes; particularly when it is recollected that unfortunately Holland during her adherence to and alliance with this country, sunk from that rank and power to which her commerce and industry had raised her amongst the nations of Europe. Her fleets and armies were no longer at her own disposal. America, therefore, viewing her helpless situation, was induced more extensively than ever to enter into this trade from the prospect of its permanence. In the case of *The Minerva*, Andaulle,¹ in which it was argued that a neutral ship trading from the colony of the enemy to the mother country, Spain, was liable to confiscation; the court below restored the vessel, although the destination was ascertained to be direct from the colony to the parent state. This permissive trade, however, was not confined to Americans. Other foreigners had partaken in it, and we have had an opportunity of knowing that Danish merchants have been permitted to trade thither during peace, although it appears the first printed reason for condemnation assigned in this case is, "because the trade of the colony of an enemy not permitted in time of peace, and not within the provisions of the order of the 23d June, 1803, was illegal." Now this first misstates the fact, and next proceeds upon the assumption that

¹ 3 Rob. Rep. 229.

the places referred to are actually colonies, and begs the whole question. This order cannot possibly have a reference to the condemnation of vessels in any trade except a trade by neutral vessels from the colonies of the enemy to the mother country, the exception being made in [* 300] favor of neutral vessels * carrying on trade directly between such colonies and the neutral country to which these vessels belong, and laden with the property of such neutral country. This order, it must be obvious, referred to close colonial ports. The Isle of France has never been considered an interdicted port, but in common with some others has been designated as a port of call and refreshment. Such are the Cape of Good Hope, St. Helena, and others. It has been alleged that upon the Navigation Act this trade was illegal. Admitting this as a principle, it becomes necessarily a part of their case that she was unlading in the island, or was going thither for that purpose ; but the vessel never arrived there, and the intention is most expressly disavowed. Her object was to obtain refreshments. Her crew was in so sickly a state that she was unable to double the Cape. No other port was open or within their reach. The very issuing of the Navigation Act by a rash and impolitic government on the eve of a war, a time when every other nation would have been disposed to retract, notwithstanding proves the trade there was open at least previous to its enactment; namely, in the peace preceding. It is, therefore, perfectly unnecessary to consider or reply to the observations made respecting the probable establishment of a free port in that settlement. This Navigation Act being of a municipal nature, bears but a faint resemblance to the jealous political guard which has been imposed by all nations upon their West India colonies, and which has interwoven itself into all the treaties of modern date. The learned judge of the court below, in giving his judgment in the case of *The Immanuel*, observed, that notwithstanding the general exclusion of other nations from the colonies,¹ the Americans were [* 301] particularly favored, and even during periods * of peace had been permitted to exercise a limited trade with the colonies. The relaxation in their favor seems to have been very general, and this instance considerably strengthens the presumption, that as the closer colonial establishments were open to America, these particular establishments were never intended by their respective governments to be closed against them.

The secret letters of the Dutch Company and their agents have been confidently insisted on as proofs of the disposition of the govern-

¹ 2 Rob. Rep. 201.

The Patapsco. 1 Acton.

ment with respect to these Dutch settlements. What reference can they possibly have to that which it is necessary the respondents should establish in support of their case? These are not official notifications of the intention of the government, but are merely the complaints of a commercial body, upon finding the Java ships had been supplanted in this lucrative trade. Nothing can be inferred from it in the way of general law. These remonstrances admit that Danish China ships had also partaken of this trade to a great extent in time of peace. But the interference in the coffee and spice trade is that of which alone the company complain. With respect to the articles of sugar, arrack, &c., which constituted this cargo, no monopoly even is alleged. The question of illegality in exporting this cargo is not raised even upon the evidence adduced for the captors. The objection which has been raised upon the basis of the revenue law of that island is one perfectly nugatory. This court cannot be called on to support and enforce the revenue law of another nation by the confiscation of neutral property, were it admitted that the trade in which that property had been engaged was subject to the penalty of confiscation by the revenue law; but this fact is not substantiated; indeed, the notorious infringement of the principle by all other foreigners resorting thither * seems to dis- [* 302] prove the position. To establish the captor's case it is necessary to show foreign merchants had made no footing in this trade in peace, but this letter of 1789 shows they had obtained it to an alarming extent. The letter of the company in 1790¹ admits the trade is so frequent that they apprehend thence serious injury, and recommends the government of Batavia to avoid facilitating their trade. Strange proof of the existence of prohibitory national law, indeed! Why not proceed at once to seizure and confiscation? This is at once a tacit admission that the trade was not even prevented by the revenue laws of the settlement. What would have been the tenor of instructions from this country to the government of our colonies if it were represented that the Americans carried on a trade there in violation of our revenue law? Certainly a severe reprimand for the neglect of government, and an order to seize and condemn all vessels engaged therein. Another letter,² dated 1791, speaks of an intention of future prohibitory enactments. Of any existing law and practice conformable thereto these communications are perfectly silent. Another,³ written in 1791, expresses such doubt in the mind of the company as to the propriety of the governor's con-

¹ See Appendix.

² *Ib.*

³ *Ib.*

duct in having permitted an importation, that nothing can be thence inferred unfavorable to the position upon which we rest our case. It is material also to observe, that these permissions occurred during periods of peace, when it is urged that foreigners were always interdicted and positively excluded. The only objections made originate in the commercial monopolising views of a jealous company. How should our government, if thus called upon, treat an application or remonstrance on a subject of this nature?

[*303] However prejudicial the infringement might *appear to the company, government would consider it a mere matter of profit and loss between the individuals concerned. Nothing appears throughout this part of the evidence in confirmation of the existence of any prohibitory law, but much is disclosed to disprove it. Upon the subject of Mr. Polanen's letter, it is rather extraordinary that a despatch, treating of things as they actually were at the moment of communication, and written in August, 1809, should be adduced as evidence to affect a vessel captured in 1805. This refers merely to the present trade of Batavia during a war, contains no proof of the fact of exclusion, but shows that it was the anxious wish of the company not only to throw open the trade, but even to make considerable sacrifices of emolument in order to induce Americans to enter into it more largely. Java coffee being an article of more ready sale than spices, the object to which this agent directed his attention was the assimilating the profits upon a cargo of spices to that on one of coffee, so as to extend the trade in spices, and thus, by the medium of Americans, dispose of produce accumulated by reason of the embarrassment of their own trade. An invitation is here certainly held out, but solely that of increase of profits. Such a trade would no doubt increase during war, yet vessels engaged in it would not be considered, in a court of prize, liable to confiscation *ex consequentia*. A distinction, it has been said, is made by him with a sneer, between the trade of the Moluccas and that of Java, and it is contended he knew better. His observations bear no such interpretation. This, alone, was the great object of his inquiry, "What is the proposition maintained with respect to this trade amongst the Americans?" He asserts they entertained the idea that the Eng-

[*304] lish considered the one a customary *trade, the other not.

He had nothing further to investigate, but represents himself satisfied it would induce the persons with whom he was contracting, to enter into his views upon more advantageous terms to the company. By the treaty of Munster, it was certainly stipulated that Spain and Holland should not interfere with their respective trades to their different settlements in India; but this originated in a wish

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to complete their separation, so as to enable each to exercise an entire and undisputed sovereignty in their respective dominions. The treaty of 1782 stipulated for a general reservation of rights, so that if America had any rights, they were reserved to her by the terms of this treaty. The terms are general; it would, therefore, be necessary an express stipulation should be made to interdict the trade by Americans to Batavia. Nothing less would have been effectual, since no fundamental principle existed to debar her trading thither. This opinion had its due influence upon the mind of the court in the case of the *Two Marias*, Bourne,¹ decided 2d of May, 1809, which sailed from Batavia by the *Isle of France* to America. The voyage was contended to be from Batavia to Holland through these intermediate ports. There was, besides, a spoliation of the papers on board, which the master accounted for by stating the inconvenience of conveying private letters. Further proof was admitted as to the part of her cargo consisting of Java coffee, and the remaining goods, taken on board in America, were restored. Giving the captors the utmost that can fairly be made of Polanen's letter, we contend they have not taken that burden of proof upon them which is necessary for condemnation. Nor in a question of such extreme importance to the interests of America, more particularly in the present state of European traffic, it would be imprudent, *in the extreme, to impute, on [* 305] the grounds at present offered to the court, the possibility of condemnation.

Stephen, same side, arguing in support of the principles just laid down, considered it a violation of common sense to describe Java, an island of seven hundred miles in length, as a colony. Hindostan might as well be similarly denominated. These places had always been described by Dutch writers as factories. Colonies, thus denominated from the term *colonus*, were peopled from the mother country with agricultural views. Such were the West Indian farms, cultivated by laborers procured from Europe and Africa. The proprietary interest of such land resided in the mother country. It was a mere transmarine farm, depending solely on the mother country for its supply by importation or trade by exportation.² If a West Indian colony surrender, it becomes, with the property there, altogether prize to the captors. Would this be the case if Java were conquered? Gibraltar might equally as well be considered a colony of England. After dreadful conflicts, it was conceded, by the treaties of Munster

1 Lords.

2 Immanuel, 2 Robinson's Reports, 198.

The Patapsco. 1 Acton.

and others, that particular nations should not trade to these and certain other settlements abroad. But none ever heard of a war to prevent a trading by other nations to Jamaica. The strict and absolute nature of a colony would be sufficient in itself to prevent any such trade. A law might as well be passed, prohibiting a trade from London to Bristol by foreign ships. Supposing the non-supply of Java would make it surrender to the forces of Great Britain, it would be difficult to admit that Great Britain, in consequence of the regulations previously adopted by the Dutch company, as it had been urged, could avail itself of them so as to prohibit the Americans [*306] trading thither. If the Dutch *company lost their ascendancy, doubtless even this restriction would be taken off altogether. There had not appeared in the conduct of the court any anxiety to reserve this question of national character. This trade had been carried on by America for a long time without any interruption; its legality might have frequently become a subject of discussion in this and other courts. Thus, in the case of *The Indus*,¹ a vessel engaged in a similar trade, although instructions had been given to the master to alter his manifest, on further proof the court decreed restoration. Shortly after, another case occurred from Matanzas, in the Havana, and similar instructions had been given, which was followed by condemnation. The cases were, in some respects, similar, but the court proceeded upon those principles only which were applicable to the different settlements to which the parties traded. The general practice of this court had been considered by all merchants as a standard of security in commercial speculations. How dangerous and unjust, then, would it prove, to pronounce an accustomed neutral trade illegal without any previous notice. In *The Calypso*, one of these cases, there were four very strong affidavits to prove the appearers never heard of any restriction of the trade to the Isle of France. The French Navigation Act undoubtedly proved an additional restraint on foreign trade, but stopped far short of our monopoly in reference to the colonies. No part of the East was laid under similar restrictions as the settlements in the West Indies. In *The Erin*, one of these cases, the judge of the court of Bombay appeared to be satisfied this trade was open. Whenever vessels have been seized sailing from the Isle of France to British or neutral ports, it had been generally for defect of papers or suspicion of fraud. The grounds of decision in **The Penman* and *The Amsterdam Packet*, was that of fraud. If even this

¹ Lords.

The Patapsco. 1 Acton.

vessel had entered the Isle of France, and disposed of her cargo there, it would not subject her to condemnation, the trade thither being permitted. To land a passenger there would not have been illegal; but neither he, or the vessel, ever reached it, the distress and sickness of the crew leading the master to avow an intention which occasioned this detention. If, however, the court should not be disposed to restore this property, he hoped there was abundant inducement to dispose the court to admit the claimant to the benefit of further proof.

The *King's Advocate*, in reply, did not understand the objection raised, that these restrictions, if in force, arose from mere municipal regulations, which, therefore, the court could not be called upon to enforce. Were they not all founded upon the same general policy of commercial interests in ships, sailors, foreign commerce, and the great national advantages resulting from them? In what was the foundation of these restrictions defective? By the first charter of the East India Company it was particularly provided, that stranger foreigners should be compelled to obtain special licenses in order to enable them to trade in these establishments. These restrictive regulations were enforced with peculiar strictness. The Navigation Act showed the disposition of France to be equally averse to the interference of other nations in their trade to the east as in that to the west. The late decisions in our courts of law,¹ had recognized this mutual monopoly, as long established by various treaties. The interval of the peace was too short to ascertain what was intended to be the permanent policy of the French or Dutch governments in their relations with India, as had *been already laid down by the court [*308] with respect to the enemy's settlements in the West Indies. The proof imposed on the respondents was extremely difficult. They had to seek in foreign countries for principles of foreign law applicable to this case. The obstructions thrown in their way were not merely accidental. At least, suspicion should arise from the circumstance of the master's unwarrantable departure from his instructions. The party should, therefore, be so far concluded by it as to be required to introduce further and satisfactory proof, if the court should be of opinion the case of the respondents did not entitle them to the affirmation of the sentence pronounced by the court below.

JUDGMENT.—July 25th.

SIR WILLIAM GRANT. Having had the general question on the

¹ Bird v. Appleton, 3 T. R. 562.

The Catharina Elizabeth. 1 Acton.

Batavian cases long under consideration, and given to it that attention which so important an investigation demands, we have been induced to conclude the evidence now offered to the court is too imperfect to found any opinion one way or other upon the general nature of the trade in which these vessels were occupied. That being the case, and the captor having failed in substantiating the position upon which he principally founds his right to make prize of the vessels in question; namely, the illegality of this trade, we are of opinion the consequence is, that the several sentences of condemnation from which the claimants have appealed must be reversed, the circumstances of each particular case being insufficient to support upon other grounds the sentence of the court below; whilst the sentence of restoration in that case, from which the captor has appealed, must be affirmed. In all these cases, however, we decree the payment of the captor's expenses in this court and that below.

[* 309] * SENTENCE.

The court decreed the proofs exhibited by the captors in this cause did not sufficiently establish the illegality of the trade in which this ship was engaged, and pronounced for the appeal and against the sentence of the court below, and restored the ship and cargo, on payment of the captor's expenses in both courts.

The sentences of condemnation pronounced on *The Liberty*, *The Prudent*, and *Calypso*, were also reversed. The sentence restoring the ship and cargo, in the case of *The Erin*, was affirmed.

CATHARINA ELIZABETH, Sjobeck, master.

June 23, 1810.

Carrying to a remote port for adjudication in most cases unjustifiable.¹ Costs and damages decreed against the captor for misconduct. Freight pronounced to be due, in consequence of the interruption of a voyage by the capture and subsequent condemnation of the vessel in a remote port. Specie restored, "being to the consignment of several British merchants," though from an enemy's port. Freight due thereon. Privileges of a master, chartering his vessel for a particular purpose. Capture considered delivery, so as to entitle the owners of the vessel to freight.

A SWEDISH vessel, laden with wines and a considerable quantity

¹ [See *The Wilhelmsberg*, 5 C. Rob. 143.]

The Catharina Elizabeth. 1 Acton.

of dollars, on a voyage, as asserted, from Teneriffe to London, was captured 23d April, 1805, by the private ship of war *Spy*, in endeavoring to reënter the port of Oratava, in the island of Teneriffe. No papers were found on board. The ship was carried to Barbadoes, where she, together with that part of her cargo consisting of wines, and also \$500, the private property of the master, were restored; the remainder of the specie was condemned.

The *King's Advocate*, for the appellants. The nature and circumstances of this case call imperiously upon the court to mark with peculiar sentiments of disapprobation the unjustifiable conduct of the captors. This vessel, under charter-party, sailed with a cargo *from London to Oratava, where she proceeded to [* 310] take in a return cargo of wine and some dollars. Whilst this vessel was lying off and on, waiting for the master, who was on shore, procuring his papers relative to this cargo, she was seized by The *Spy*. The master, seeing the capture from the shore, in vain attempted to prevail on some Spanish seamen to put him on board his own vessel, and, being unable to learn to what port his ship had been carried, sailed for England. The captors put men on board to navigate her, and removed five of her crew, consisting in all of seven men, on board The *Spy*, one of whom shortly after fell, in an action with a French vessel, which finally captured The *Spy*. The prize-master carried this vessel to Barbadoes, although he must have been aware of the danger of bringing a vessel bound for Europe to so remote a port for adjudication. In that port the vessel suffered so severely by accident, that she, on appraisement, appeared to have been materially reduced in value, and was reported to be worth no more than 250*l*. Upon the sound and just principles which have regulated the decision of the High Court of Admiralty in *The Anna, La Porte*,¹ a similar case of unjustifiable detention and removal to a distant port, in which the court observed, that the discretion granted to cruisers by the general instructions to bring in prizes to some convenient port, should be cautiously examined; no plea of even a mutinous disposition in the crew would be admitted as a sufficient sanction or apology for similar misconduct. In the case of *The Maryland*,² this court was of opinion the captor, a Liverpool privateer, was highly censurable for carrying her prize, which had almost reached the coast of Europe, back to the West Indies, although it was *argued the privateer was bound there [* 311]

¹ 5 Rob. Rep. 385.

² Lords, 1797.

The Catharina Elizabeth. 1 Acton.

direct; the court decreed a restitution, with costs and damages. These judgments reflect honor upon the courts of prize in this country, and must be decisive of the present case. In the papers of this case are found some, it is presumed, of a suspicious nature, and reflecting on the proof of property. One is a bill of lading for the wines, for account of merchants of Hamburg, to be delivered at Tonningen to these merchants; another is a letter from Scott, Idle, & Co., of London, to the same merchants, purporting to acknowledge the receipt of an ostensible letter of order from him relating to this cargo, and engaging not to reclaim the same from these merchants in case of detention. This, it must be evident, was an innocent attempt to render this trade from a Spanish island practicable and safe as against the enemy. As the vessel had obtained a license from his Majesty to import the said goods to Great Britain, and these Hamburg merchants have, by papers now produced, on oath disclaimed all interest in this property, there can be no other reason afforded for her possessing such papers. The dollars condemned are proved to have been taken on board by the captain, to the consignment of several British merchants. From these circumstances the appellant trusts the court will consider him entitled to recover the dollars condemned in the court below, pronounce freight to be due on the wines, and condemn the captor in costs and damages.

Arnold, for owners of the wines, contended no freight could be fairly demanded: first, because the voyage, so far as respected these owners, and to which the charter-party had reference in [*312] point of fact, never commenced, * as it was for the importation of wines, which could only begin after the cargo was completed and the ship had sailed in the usual way; secondly, the vessel having sailed under an express license, it was the duty of the master to conform thereto. In taking, therefore, the dollars on board, he so far forfeited the protection of the license, which did not comprise this sort of property in the articles therein specified, and thence the consequence of the detention of the vessel should be visited upon himself. As the license had been procured for the express purpose of importing wines, such a conduct was a violation of his engagement.

Stephen, in reply, observed—The charter-party contracted that, on delivery at London, freight should be paid, in full satisfaction both for the outward and homeward voyage. It was a maxim, capture was always considered delivery, to entitle the party to freight. By the charter-party, also, his cabin was reserved to him and his sole

The Josephine. 1 Acton.

use; the dollars, therefore, might be carried without any breach of engagement. Indeed had he taken half a cargo of enemy's property on board after he had received these wines, he could not be said to violate his engagement; as the charter-party only bound him to take on board what was there provided for him. If the master had broken this contract, an action might be sustained against him hereafter upon that breach. The decision in this case would not affect the parties in such an action at common law. The alleged cause of her detention was a suspicion entertained that she was trading between the ports of the enemy.

• SENTENCE.

[*313]

The court pronounced for the appeal, retained the principal cause, therein condemned the captors in costs and damages sustained by the owners of the ship subsequent to the capture, including the freight which would have been due upon the cargo claimed on behalf and decreed to belong to Messrs. Scott, Idle, & Co., in case the same had been delivered pursuant to the charter-party, and moreover pronounced freight to be due upon the dollars condemned in the court below.

JOSEPHINE, Chilton, master.

June 30, 1810.

Importation of gum from Senegal, under license. Property imported on account of an enemy not protected by a general license.¹

Property, upon which an enemy has a lien to a certain extent, subject to confiscation to that extent, although no part can be specifically proved to be actually that to which he might be entitled, and the lien acquired under a written agreement, upon a balance of accounts.

AN American ship, bound from Senegal to London, with a cargo of gum, for account of British and neutral owners, under protection of his Majesty's license, was captured on the 26th October, 1806, and sent in for adjudication. In the High Court of Admiralty the ship was restored, by consent, to the American claimant. The principal part of the cargo was pronounced to be British and American property, and restored; and the remainder condemned as enemy's prop-

¹ [The Beurse Van Koningsberg, 2 C. Rob. 169, note.]

perty, not protected by his Majesty's license. From this sentence, restoring the principal part of the cargo, the captor and his Majesty's Procurator-General prosecuted an appeal, to which the claimant's proctor brought in an adhesion, so far as respected the parts of the cargo condemned.

[* 314] * *Stephen* and *Arnold*, for the claimants, contended—

That the captor had no reason to be dissatisfied with the sentence of the High Court of Admiralty, restoring the bulk of this cargo, since the documents in the cause clearly proved the property to belong as claimed. By the attestation of Mr. Wilson, of London, it appeared he had long been engaged in trading to Senegal, and procuring thence cargoes of gum, to be imported into England, for the use of various manufactories in this country, and that he had supplied nearly three fourths of the quantity necessary for this supply for several years past. The difficulties attending this trade to an enemy's colony were considerable, and recourse was necessarily had to artifice and concealment, in order to protect property embarked in a speculation so hazardous; false papers were therefore put on board, to protect the vessel from enemy's cruisers. Wilson entered into an agreement with a Mr. Waterman, an American, who proceeded to Senegal, to provide a cargo of gum, to be imported into England for their mutual account. In May, 1806, he chartered the American ship *Rufus*, for Senegal, and obtained a license from his Majesty to import on board the said ship a cargo of gum from Senegal, but which he afterwards considered was not sufficiently general for the peculiarly critical nature of the trade in which he was engaged; he therefore procured the license to be altered at the council office, by inserting therein, "or any other neutral ship." With this license the *Rufus* arrived at Senegal, when the design of sending her back to England was abandoned, and the cargo procured by Waterman imported on board the American vessel *Josephine*, under the protection of the said license. Upon the arrival of the ship in

[* 315] England, * and even until Mr. Waterman's return to this country, he considered the cargo exclusively their property, as he deposed in his first attestation of claim. He, however, had since been informed of arrangements made by his partner with which he had reason to be dissatisfied; of which the attestation of Mr. Waterman gave the following account. During his (Mr. Waterman's) stay at Senegal he had received great personal civilities from the French governor, Blanchet, by which he was enabled to carry on a trade direct to this country. He had been induced at the request of the governor to ship for him on a former occasion 1,200 pounds of

The Josephine. 1 Acton.

gum, on board a vessel destined for London, the proceeds of which were remitted for the use of the governor's daughter, who was then at school in Paris. Some time after, the governor again informed him he was desirous to remit another sum to Europe for a similar purpose, and requested him to give a bill on London payable at Paris for 5,000 francs, and in exchange offered to give him 5,000 pounds weight of gum. Finding it inconvenient to draw upon London, yet being anxious to accommodate him, both on account of the kindness he had received and the expediency of complying with the wishes of the governor under the particular circumstances of his situation, he proposed to send this quantity of gum on board this ship freight free, to be disposed of at London, and remit the proceeds to Paris for the use of Mademoiselle Blanchet. To this the governor acceded, and the 5,000 pounds weight constituted part of the cargo of The Josephine at the time of the capture. With respect to another part of this cargo, consisting of 12,000 pounds weight of gum, Mr. Waterman deposed, that in the course of his trade he became connected with Mr. Filleul, a Frenchman, * agent [* 316] of a house at Hamburg. They occasionally accommodated each other with gum and other articles. About the time of his departure from Senegal a balance on this account remained due to Filleul, amounting to 12,000 pounds, which finding it inconvenient to discharge at Senegal, he engaged to pay him the amount thereof in London from his own share of the proceeds of The Josephine's cargo, subject, however, to a deduction of the expense of freight and usual commission, and subscribed with his initial the following acknowledgment: "These are to certify that I have received of Mr. Filleul 12,000 pounds gum, all the expenses here he has paid me; the freight and expenses to Europe, loss or gain of weight, and other expenses, are to be borne in proportion to the cargo, after deducting all these, com., &c., the proceeds are for him. W." This mode of liquidating his debt he was compelled to adopt from inability to pay in specie, not with any intention to cover the property of an enemy, considering Filleul at the time to be a neutral subject, as he had a passport from the governor of his Majesty's settlements at Goree. No part of the cargo was ever shipped by or on account of Filleul; nor any part of the cargo considered the specific gum which was owing to him. He had no interest in the cargo. The debt could not be cancelled but by payment thereof in London, nor was it intended Filleul should incur any risk with respect to any part of the cargo. Being apprehensive lest the actual destination of the cargo to London should be detected in the enemy's colony, Mr. Waterman did not advise his partners of the transaction. During his absence Filleul called at Mr.

Wilson's counting-house, requesting a loan of money, as he [* 317] was much inconvenienced from the * circumstance of Mr. Waterman's delay, who was, he said, considerably indebted to him. He received 30*l*. from Mr. Wilson, who considered him a distressed man, for which he gave his bill of exchange on Mr. Le Clerc, his employer at Hamburg. On Mr. Waterman's arrival, finding his partner much displeased by this shipment of the governor's property, he forbore to acquaint him of the arrangement made with Filleul. By a second and subsequent affidavit Mr. Wilson deposed, that the whole cargo, except the 5,000 pounds mentioned, was purchased by funds arising from the proceeds of various goods sent out by him in different ships to Senegal, under his Majesty's licenses. Having imported with his own capital three fourths of the gum brought into Great Britain within these fifteen years; for the protection of which importation government had granted him licenses long prior to the grant of any other, from a conviction of its indispensable necessity in the various manufactures of this country. The trade was attended with great difficulties, and it was particularly necessary to conciliate the governors of the colony. Hence he felt it absolutely necessary to make the remittance of 2,400 francs in April, 1807, as the proceeds of 5,000 pounds for the use of Mademoiselle Blanchet, lest the governor should, in retaliation for the loss he had sustained, proceed to confiscate his property at Senegal and that of other British merchants. The loss in the event of the condemnation of this part of the cargo must be sustained by the claimants. The property, therefore, confiscated could not be considered that of the enemy. In fact, from the manner in which trade was carried on in that settlement, where gum was a sort of circulating medium by [* 318] which debts were paid, remittances made, and most * other articles estimated, it should be considered as a mere transfer of so much money from the colony to this country, to be remitted thence to France. The exclusive property in this gum left the governor the moment it was received on board. He only transferred a credit to an amount as yet unascertained, which was to be regulated by the state of the market here, operating upon it in the same manner as the exchange upon a remittance by money or bill, and strictly speaking, there was here no tangible property upon which a court of prize could proceed to adjudication. The same arguments were applicable in this respect to the proceeds of 12,000 pounds weight to which Filleul was entitled only in an equitable point of view, and that exclusively from Mr. Waterman, as the whole cargo, with the exception of the 5,000 pounds weight, had been purchased by the funds of Wilson only, who had consented to allow Waterman, as his agent,

The Josephine. 1 Acton.

and as a remuneration for his personal service, one fourth of the proceeds. The loss occasioned by the refusal of the captor's agent to liberate this cargo on bail, in order that it might be disposed of gradually and as circumstances might render it expedient, (being an article of very limited consumption,) amounted to upwards of 3,000*l.* which circumstance had induced the claimants to apply to his Majesty for licenses more effectually protecting their accustomed trade, and empowering them to import cargoes of gum, or such other raw commodities from that settlement as were permitted to be imported by the order of the 11th of November, 1807, to whomsoever the said goods might appear to belong, with liberty to touch at a neutral port to obtain fresh clearances. On these grounds the claimant had adhered to the appeal, and prayed restitution of these parts of the cargo.

**The King's Advocate* and *Dallas*, for the appellants, con- [* 319] tended — That the license having been employed in attempting to cover the property of the enemy, the parties to whom it had been granted had forfeited the benefit of its protection. Nothing could be more in contradiction to the intention of the British government than such an application of its indulgence. The general principle that licenses should be taken to be *stricti juris* would be sufficient to lead to a condemnation of the whole property embarked in a speculation under a license which had been so grossly abused. The arguments adduced for restoring the parts of the cargo condemned were perfectly nugatory, founded upon the difficulty of obtaining a supply for this country, the necessity on the part of the enemy to make remittances to Europe, and the willingness of the claimants to accommodate these persons by perverting the purpose to which this license was intended to be applied. No necessity appeared to exist for a violation of national character in this trade; in fact this country had always been amply supplied without it. The necessity the enemy labored under to expose his property to capture, or the acquiescence of our merchants or neutrals in its concealment, could not entitle such parties to any indulgence. Hence the bulk of the property was subject to confiscation, but no question possibly could arise as to the liability of that property actually proved to belong to the enemy.

SENTENCE. — July 5, 1810.

The Court by interlocutory decree pronounced against the appeal and also the adhesion thereto, and affirmed the sentence of the court below.

[* 320]

* THE EUROPA, Christian, master.

July 5, 1810.

Application for admission of further proof refused. The claimants resident in Bohemia having neglected to enter a claim in proper time in the court where, after the adjudication had been reserved for a considerable time, this property was condemned, from which sentence no appeal was interposed for seven months subsequently.

This was a case of a Danish ship bound from Tonningen to Cadiz, condemned on the intervention of the King's Proctor in the High Court of Admiralty as prize to his Majesty. The cargo consisted of Danish and Bohemian property, as appeared by the documents on board. The court reserved the adjudication of the latter property, and the usual time having elapsed from the return of the monition, and no claim having been given for the said property, the judge decreed the property as prize to the captor, and pronounced freight to be due thereon to the crown. From this latter sentence an appeal was prosecuted on the part of the Bohemian claimants.

Arnold and *Stephen*, for the captor, observed — That the claimants could not be permitted to enter into proof of their claims after such unaccountable negligence and delay. The original proceedings in the court below commenced on the 14th August, 1807. Sentence upon this part of the cargo had been reserved until November, 1808, and no appeal had been interposed until June, 1809. The court, therefore, would not extend its indulgence to a party so culpably negligent in prosecuting its claim. The nature of the property itself was also extremely liable to suspicion, from the circumstance of the asserted Bohemian proprietors having consigned their respective parcels of goods as to houses at Cadiz, consisting of the same
[* 321] number of partners, and precisely the same names * as those of the proprietors themselves residing in Bohemia, and hence the claimants could not be entitled to any particular indulgence.

Dallas and *Jenner*, for the claim, attributed the delay to the unsettled state of things upon the continent during that period. The continued state of warfare in the intervening countries had rendered regular communication extremely uncertain, if not impracticable; a fact which was perfectly well known to the court, and was sufficient, in itself, to induce it to permit these proofs, which were perfectly authenticated, to be introduced.

The Europa. 1 Acton.

JUDGMENT.

SIR WILLIAM GRANT. After so great a lapse of time since the commencement of the first proceedings in the Court of Admiralty, without any reasonable account being given for the negligence of these asserted owners, first, in entering no claim in the court below, and next, in permitting so much time to elapse without an appeal, we must consider it extremely dangerous to admit any additional proof at so late a period. Indeed, we could not rely upon it if it were permitted to be introduced. We must, therefore, pronounce against the appeal.

SENTENCE.

Pronounced against the appeal, and affirmed the sentence of the court below.

* THE HENDRICK, Hanson, master. [* 322].

July 5, 1810.

Trade by license. The fair construction of a license continues the same notwithstanding a subsequent order of council may effect a material alteration in permissive trade generally. The petitioner not necessarily the nominee except described as such in the license.

THIS ship, under Prussian colors, bound with a cargo of wine from Bordeaux to London, under the protection of his Majesty's license, but provided with colorable papers, stating the destination to be St. Petersburg, was captured, proceeded against in the High Court of Admiralty, where the ship and cargo were restored on payment of the captor's expenses; from which sentence the captor and his Majesty's Procurator-General appealed.

For the claimant, *Dallas* and *Stoddart*. From the peculiar nature of the license, by which this vessel and her cargo were protected, the court cannot but concur in opinion with the learned judge below, and affirm the sentence. The license¹ granted by the secretary

¹ LICENSE.

To all Commanders of his Majesty's ships of war and privateers, and all others whom it may concern, greeting.

Whereas it hath been represented to the Lords of the Council, by Godfrey Fiefe &

The Hendrick. 1 Acton.

[*323] *of state to Messrs. Fiefe & Co., merchants, London, is of a very unconfined description, and permits three vessels, bearing any flag, to proceed with cargoes of *wine from Bor-

Co., of London, merchants, that they are desirous of obtaining a license or pass for permitting three vessels, bearing any flag, to proceed with cargoes of the following articles from Bordeaux, or any other French port, to a port of Great Britain, grain, if importable, according to the provisions of the corn laws, seeds, saffron, rags, oak bark, turpentine, hides, skins, honey, wax, fruit, raw materials, linseed cakes, tallow, weld, wine, lace, French cambrics, and lawns, and that the masters may be permitted to receive their freight, and depart with their vessels and crews, to any port not blockaded: I, the undersigned, one of his Majesty's principal secretaries of state, in pursuance of the authority given to me by his Majesty by order of council, under and by virtue of powers given to his Majesty by an act passed in the forty-eighth year of his Majesty's reign, intituled, An act to permit goods secured in warehouses in the port of London, to be removed to the outports for exportation to any port of Europe, for empowering his Majesty to direct that licenses, which his Majesty is authorized to grant under his sign manual, may be granted by one of the principal secretaries of state, and for enabling his Majesty to permit the exportation of goods in vessels of less burden than are now allowed by law, during the present hostilities, and until one "month after the signature of the preliminary articles of peace," and in pursuance of an order of council, specially authorizing the grant of this license, a duplicate of which order of council is hereunto annexed, do hereby grant this license, for the purposes set forth in the said order of council, and do hereby direct the commanders of all his Majesty's ships of war and privateers not to interrupt the said vessels, but suffer them to proceed as aforesaid, notwithstanding all the documents which accompany the ships and cargoes may represent the same to be destined to any neutral or hostile port, provided that the names and the tonnage of the vessels, the names of their masters, and time of their clearance from Bordeaux, or other port of lading, shall be indorsed on this license; that they shall be permitted to bear the French flag only until they are two leagues distant from Bordeaux or the neighboring coast; that if they shall have borne the said flag, proof (if required) shall be given, that they are not French built, nor manned with French scamen; that if bound up channel, they shall stop at Plymouth, and proceed from thence with convoy to their ports of destination, or as long as such convoy shall be instructed to protect them. This license to remain in force for six months from the date hereof, and at the expiration of the said period, or sooner if the voyage be completed, to be deposited (as the case may be) with the commissioners of his Majesty's customs at the port of London, or with the collector of the customs at the outports.

Given at Whitehall the 15th day of March, 1809, in the forty-ninth year of his Majesty's reign.

LIVERPOOL.

Godfrey Fiese & Co. License.

(Wrote in the margin.)

This License serves for the ship Hendrick of Stettin, of 431 tons, Peter Hansen, master, and cleared at Bordeaux the 25th August, 1809.

Order in Council authorizing the above License.

At the Council Chamber, Whitehall, the 15th March, 1809. Present, the Lords of his Majesty's most honorable Privy Council.

The Hendrick. 1 Acton.

deaux, or any other French port, to great Britain, and requires the usual indorsements on the license, of the names of ships and masters, with the *tonnage of the vessels, and the time [*325] of their clearance from the port of lading. These requisitions have been complied with most strictly. The printed reasons of the captor impeach both ship and cargo, first, as enemy's property, and, secondly, as not protected by the license. The cargo is distinctly proved by the genuine papers on board to have been shipped for account of British merchants. The papers on board, representing the consignment to persons residing in Russia, are, by the master, mate, and others, admitted to be false, and put on board merely to deceive the cruisers of the enemy. The vessel is proved to be Prussian property by the bill of sale found on board, and the depositions of all the witnesses on board. But even were she not Prussian, the claimant would not be *bound by this defect, [*326] inasmuch as the license expressly protects vessels bearing any flag, and would, therefore, protect an enemy's ship, *a fortiori*

Duplicate.

Whereas, there was this day read at the board, the humble petition of Godfrey Feise & Co., of London, merchants, praying a license for permitting three vessels, bearing any flag, to proceed with cargoes of the following articles from Bordeaux, or any other French port, to a port of Great Britain, namely, grain, (if importable, according to the provisions of the corn laws,) seeds, saffron, rags, oak bark, turpentine, hides, skins, honey, wax, fruit, raw materials, linseed cakes, tallow, weld, wine, lace, French cambrics, and lawns; and that the masters may be permitted to receive their freight, and depart with their vessels and crews to any port not blockaded. Which petition being taken into consideration, it is hereby ordered in council, that a license be granted to the petitioners for the purpose above set forth, notwithstanding all the documents which accompany the ships and cargoes may represent the same to be destined to any neutral or hostile port, upon condition that the names and tonnage of the vessels, the names of their masters, and the time of their clearance from Bordeaux, or their port of lading, shall be indorsed on the said license, that they shall be permitted to bear the French flag only until they are two leagues distant from Bordeaux, or the neighboring coast; that if they shall have borne the said flag, proof (if required) shall be given, that they are not French built, nor manned with French seamen; that if bound up channel, they shall stop at Plymouth, and proceed from thence with convoy to their ports of destination, or as long as such convoy shall be instructed to protect them. Such license to remain in force for six months from the date hereof, and at the expiration of the said period, or sooner if the voyage be completed, to be deposited, as the case may be, with the commissioners of his Majesty's customs of the port of London, or with the collector of the customs at the outports. And the right honorable the Earl of Liverpool, one of his Majesty's principal secretaries of state, is hereby specially authorized to grant such license, in case his lordship shall see no objection thereto, annexing to such license the duplicate of this order herewith sent for that purpose. STEPHEN COTTRELL.

The Hendrick. 1 Acton.

enemy's property in the cargo. In the case of *The Josephine*,¹ your lordships were of opinion a license granted to import generally a cargo of a certain description, would not avail to protect any part of such a cargo appearing to be the property of the enemy, or upon which cargo an enemy had a claim in bulk to a certain extent. Here, however, no doubt can be entertained that the license, from its peculiar construction, would extend to a much greater length than that required for the protection of this ship and cargo. In this instance the motive of the government in granting licenses is completely developed. For general licenses are not granted as a matter of favor to the applicant, but through political motives, and actually with an intention to drive the trade of the country in articles of a certain description, interdicted generally by the system of retaliation this country has been compelled to adopt by the aggression of the enemy. And upon this principle it is that we find the benefit of such licenses is not intended to be confined to the party making the application; since they may, without danger, be transferred to others not named in the license. Thus, in the present case, the license is granted at the request of Messrs. Fiese & Co., and the importation made for the account of Messrs. Rucker & Co. and Messrs. Tastet & Co. In the court below the captor's costs were granted, most probably from the circumstance of the master's having concealed from the knowledge of the captor that he was protected by license, and not having produced it until after [* 327] the ship arrived into Plymouth. * This might be the result of laudable caution on the part of the master with respect to so valuable a cargo, as he stated he did not know whether the captor was French or English for some days, but this inadvertence can by no means affect the subject of costs in this court. We therefore submit the appeal is vexatious, and should be dismissed with costs.

The *King's Advocate* and *Stephen*, for the captors. The question before the court involves considerations of considerable magnitude and interest; the nature of the authority by which licenses are granted, and the length to which the protection by licenses may extend. This license appears to have been granted in reference to the order² annexed to it; and must, therefore, be considered to be granted for the use of the petitioners exclusively, and a matter of personal favor. The permission to trade by license being an infringement or modification of the general law, prohibiting all trade with the enemy, should, therefore, be construed most strictly. The privilege is incapable of being transferred to others not named in the par-

¹ *Supra*, p. 315.

² Note, *supra*, p. 324.

The Hendrick. 1 Acton.

ticular grant. This was the sentiment of the court below, in giving judgment in the case of *The Jonge Johannes*.¹ Thus stood the doctrine in 1802; nothing has since occurred to change it. Indeed it would be a subject of considerable alarm, if, in the case of a license granted to A, B could come into court and justify his trading with the enemy, in consequence of the license having been transferred to him. The great object of government, in reserving the grant of these licenses within its immediate control, is to prevent improper persons obtaining this dangerous exemption from the restrictions * imposed by the war, which would be altogether [* 328] frustrated by permitting a transfer. Notwithstanding what has been said upon the unrestricted nature of the license, it is obvious the grant is not intended to be made to three ships to import cargoes, but to these persons to import three cargoes. No satisfactory proof of property has been exhibited, and it has been maintained none is necessary, as the license is sufficiently general to protect even that of the enemy. Upon this part of the case it will be necessary to refer to the construction of the several orders in council, regulating this species of trade during the present war. The order of the 11th of November, 1807, restricted generally all trade with those ports of France, her allies, or other nations from which the British flag was then excluded, with various exceptions; amongst which was one in favor of vessels or their cargoes not at war with his Majesty, and coming from restricted ports direct to ports in Europe belonging to his Majesty. This was followed by the order of the 26th November, 1807, which sanctioned the importation of goods into Great Britain from any port in Europe, except ports specially notified to be in blockade, to whomsoever the said goods might appear to belong. That of the 26th April, 1809, revoked the former existing orders, and denominated the trade to France, Holland, and their colonies, and also to the northern ports of Italy, from Pesara to Orbitello, illegal.

BY THE COURT.

SIR JOHN NICHOL. As things stood previous to the order of the 26th April, would not this property have been protected? The order of the 27th November, 1807, * appears to contain [* 329] a clause protecting even the property of the enemy on such a destination.

¹ 4 Rob. Rep. 263.

The Hendrick. 1 Acton.

So it would appear ; but the order of the 26th of April *revokes* the enactment in favor of such a trade, and this importation did not take place until long after, the ship's clearance from Bordeaux bearing date the 24th August.

BY THE COURT.

SIR W. GRANT. The question is, whether every license granted since the order of 27th November is to be construed in reference to that order. The order is made in favor of vessels belonging to states not at war with us, and protects goods on board such vessels coming for importation here, to whomsoever belonging. The license certainly was not intended to restrict but extend the order.

The parties should not be permitted to protect themselves, at one time referring to the letter of the instructions, at another to that of the license. And while they require that they should not have less than the benefit of the order previously issued, if no license whatever had been granted, we have a right to demand that they should not have more than the benefit of the license, as though no such order had been in existence ; particularly when it is considered the parties claiming it are British merchants, and, therefore, least entitled to favor in a transaction of this nature, where the indulgence proceeds altogether upon the presumption of the honorable intention and good faith of the applicants.

[* 330] • JUDGMENT.

SIR W. GRANT. It appears to us, that whatever was the fair construction of the license when issued, it must necessarily continue the same while it remains in force. Government could never have intended to restrict the license more than the general order. It is perfectly fair to construe the license favorably for the parties claiming, if it can be done by a reference to these instructions. And it is also necessary to observe that the petitioner, in this instance, is not the nominee, the license being granted merely at his request ; while in the case of *The Josephine*,¹ the permission was given expressly to the claimants, by name, to import a cargo on board *The Rufus*, or any other neutral ship. The only remaining question for our determination is, whether the license is to alter in consequence of a variation occasioned by the order subsequently issued ? We apprehend not. The judgment was therefore right, and must be affirmed.

¹ *Vide supra*, 315.

The Falcon. 1 Acton.

SENTENCE.

Pronounced against the appeal, affirmed the sentence appealed from, and remitted the cause.

* FALCON, Atkins, master.

[* 331]

June 19, 1810.

Costs. Condemnation in the costs of an appeal, where it appeared the appellant had entered into a written agreement to avail himself of the neutral character to protect the speculations and property of an enemy.

In this case the court, having pronounced against the appeal as a clear case of fraudulent concealment of the property of the enemy, an application was made by his Majesty's Advocate to condemn the appellant in the costs of the appeal. Amongst the papers introduced on the part of the captors were found articles of agreement entered into between the appellant, Victor Halbran, residing in New York, and Messrs. Gramont, Chageray, & Co., of Bordeaux, dated 23d of June, 1805; by which it was agreed between these parties to found a house of trade in the name of Mr. Halbran¹ solely, expressly for the purpose of serving as an *entrepôt*, or "medium, for the relations between Europe and the colonies, interrupted by the war." This arrangement, or partnership, to continue for three years, and an equal partition to be made by the parties of all the profits resulting from commissions, consignments, and speculations mutually entered into; Mr. Halbran, for whom the house at Bordeaux had provided very extensive credits in America, Amsterdam, Hamburg, and London, particularly binding himself "to cover with his name and as his property the operations of the house at Bordeaux, and to claim personally, if required, the property so covered."

The court condemned the appellants in the costs of the appeal.

¹ Hope, Dobell, p. 43.

The Margaret. 1 Acton.

[* 332]

*JENNET, Coursell, master.

July 19, 1810.

Freight. The sentence of a Vice-Admiralty Court having condemned the ship, with her tackle, freight, &c., and the vessel being afterwards restored upon appeal, a lien for freight upon the cargo accrues to the master or owners.

THIS vessel was restored, on appeal from the Vice-Admiralty Court of Nova Scotia, with part of her cargo. Upon an appeal being interposed by the claimants of other parts of the cargo, an intervention was made, on the part of the master, for freight. Upon arguing this part of the case,

Adams contended — That as the vessel had been restored upon appeal, the master was entitled to freight; the restoration amounting in effect to the exculpation of the master in the management of his ship upon this voyage. The freight had always been considered an appendage upon the vessel; the fate of the one involving that of the other.

The court, referring to the original proceedings in the cause, observed, that the ship, tackle, freight, &c., had been condemned in the court below. The Court of Appeals had pronounced against this sentence, and decreed the vessel should be restored. The sentence of restitution should, therefore, be construed to have comprised these several necessary appendages of the ship. The court, therefore, pronounced for the appellant, and decreed freight to be due to the master, and to be a charge upon the cargo.

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[* 333]

* THE MARGARET, Heard, master.

July 21, 1810.

Contraband with false papers, suppressing its shipment and the destination to the enemy's colony. Condemnation of ship and that part of the cargo belonging to the owners of the ship, the remainder being condemned as enemy's property. The rule holds notwithstanding the vessel may have performed various different voyages, and repeatedly changed her cargoes at these several ports to which she may have traded from the time of her departure

The Margaret. 1 Acton.

from her original port to her return ; nor is it necessary the return cargo should be part proceeds of the contraband on the former voyage.

THE captor having only a commission against Spain, this ship and cargo on a return voyage from Batavia to Baltimore, had been condemned in the Vice-Admiralty Court of Barbadoes as a prize to the crown and a droit of admiralty, having been employed on the outward voyage in conveying gunpowder and other contraband articles to the Isle of France, a colony of the enemy.

The *King's Advocate*, for the respondent, adverting to the case of *The Rosalie and Betty*,¹ contended, that upon the principles there laid down by the learned judge of the High Court of Admiralty, that the part of the return cargo which was the subject of the present appeal ; namely, a moiety of certain shipments of sugar, coffee, and pepper, claimed as the property of the owners of this vessel, Messrs. M'Faden and Schwartes, of Baltimore, (the remaining moiety, together with the residue of the goods on board, appearing to be the property of a Dutch merchant,) was justly liable to condemnation ; first, because the outward cargo, consisting principally of tar and gunpowder, and such contraband articles, were, by means of false documents and suppression, carried to the Isle of France ; and secondly, because the homeward cargo was also falsely documented, and this moiety of the sugar, coffee, and pepper claimed, was the produce arising from the proceeds of the said contraband.

* *Arnold and Stephen*, for the claim, contended that this [* 334] return cargo could not be considered to have any connection whatever with the objectionable outward cargo. The vessel had, since her first leaving Baltimore, entered into a completely distinct line of commerce ; had performed a number of different voyages, in which she continued to be occupied from the year 1804 to 1807. In the outward voyage she touched at the Cape of Good Hope, and disposed of part of her cargo for cash ; proceeded thence to the Isle of France, where the remainder was disposed of ; from thence to Batavia, in ballast ; again sailed with a cargo of arrack, &c. for Tranquebar ; returned to Batavia with piece goods ; and finally sailed with this cargo for Baltimore, after three years and four months occupied in these several voyages, four of which had intervened between that in which the objectionable cargo was carried out and

¹ 2 Rob. Rep. 343.

The Margaret. 1 Acton.

the present. In these various fluctuations and changes of property it must be supposed that any possible connection of the present with the first cargo, comprising the contraband articles, must be completely lost. This could not be considered the return cargo to the first.

BY THE COURT.

SIR JOHN NICHOL. In all these successive voyages and exchanges of property it is admitted by the master that after the first cargo, which was exclusively the property of the neutral claimants, a Dutch merchant had a joint concern of one half in each subsequent cargo, and that in the present voyage the Dutch merchant owns the whole of the cargo except the moiety of these shipments of sugar, coffee, and pepper.

[*335] * It certainly would be admitted this master had acted strangely throughout, and had been very liberal in admitting that which must be prejudicial to the interest of the claimant, who had lost upon the voyage the master in whom they reposed confidence; and this acquiescence in the views of the captors had been amply recompensed by their indulgence, as they had restored to him all the property he had an interest in on board, with other signal marks of favor. The property of the present cargo appearing completely destitute of any connection with the first, it would be a step beyond any the court had taken on any former similar occasion, were this property considered liable to condemnation. Some boundary should be established or else it would be impossible to ascertain when a vessel might be considered exempt from the consequences of an act of delinquency, however remote.

JUDGMENT.

SIR W. GRANT. The principle upon which this and other prize courts have generally proceeded to adjudication in cases of this nature, appears simply to be this, that if a vessel carried contraband on the outward voyage, she is liable to condemnation on the homeward voyage. It is by no means necessary that the cargo should have been purchased by the proceeds of this contraband. Hence we must pronounce against this appeal, the sentence of the court below being perfectly valid, and consistent with the acknowledged principles of general law.

SENTENCE.

Pronounced against the appeal, and affirmed the sentence of the court below condemning the property of both ship and cargo.

The *Eliza*. 1 Acton.

* THE *ELIZA*, Burrough, master.

[*336]

July 25, 1810.

Property restored on further proof. Application for captor's costs refused — the captor having neglected to bring in the proceeds in disobedience to a monition from the court below.

In this appeal from the sentence of the Vice-Admiralty Court of Jamaica, condemning the ship and cargo, an application was made to the court for the captor's expenses, under the following circumstances.

Addams, for the captor, stated, that further proof having been permitted to be introduced in the cause: he had examined the further proofs and admitted them to be satisfactory. To prevent unnecessary trouble or delay he had proposed, on behalf of his party, to consent to the restoration of the property on payment of the captor's expenses. To this reasonable proposal the claimant had refused to assent. The captor was certainly entitled to an allowance of expenses where the claimant had recourse to further proof to substantiate his claim. As this obstinacy had been the sole cause of the parties once more presenting themselves to the court to prove what was not disputed, the claimant should, therefore, defray the captor's expenses in the present application.

Arnold, for the claim, contended the claimant was perfectly justified in refusing to take back the property by consent, when that consent was accompanied by a condition to pay a sum of money which the captors had no pretension to demand. The claimant was perfectly at liberty to come before the court, notwithstanding the offer made by the captor. Circumstances might frequently arise which would render it expedient * to make further applica- [*337] tion. In the present case he had to complain, that notwithstanding a monition had issued in the court below for a considerable time past to bring in the proceeds, the captor's agents had neglected to comply therewith, and had to the present hour kept them back. Part, therefore, of his duty would be to apply for an attachment against the captor's agents to compel them to perform their duty.

JUDGMENT.

The court observed, that the captor's agents having so manifestly neglected their duty, no indulgence could be granted to a party under such circumstances. The application was refused, the ship and cargo restored, and an attachment decreed against the captor's agents.

THE JAMES AND WILLIAM, Pollard, master.

July 25, 1810.

Captor's expenses. Ship and cargo sent on to England by order of Vice-Admiralty Court for sale pursuant to 41 Geo. III. sect. 9. Expense attending the providing securities to be allowed a charge upon the property. Insurance upon the same and upon freight allowed. Commission on effecting insurance; on purchase of exchequer bills.

In this case their lordships, on the 10th February, 1808, had pronounced for the appeal of the claimant, and decreed the ship and cargo to be restored, or the value thereof paid to the claimant, upon payment of the captor's expenses in both courts, referring the accompt sales of the said ship and cargo, brought in by the claimant's proctor, to the registrar and merchants to report thereon. A report was accordingly made out, which was objected to in several articles. These objections were again referred to the registrar [* 338] and merchants, who reported "that in respect to the several articles so referred to them, the same ought to be allowed as in the schedule thereunto annexed."¹

1 SCHEDULE.

	Disallowed.	Allowed.
Interest on cash advanced on account sales of ship	3 17 5	
Ditto Ditto on cargo	28 2 6	
Ditto Ditto on general account	12 13 10	
These charges are set off against interest due to the claimant from the prompt of sales, till the purchase of exchequer bills.		
Premium of insurance on freight and commission	163 1 8	
½ per cent. on effecting insurance on £22,020		110 2 0
½ per cent. on purchase of exchequer bills		95 0 0
½ per cent. on bill for outfit, £864, part of	1,097 5 8	4 6 5
Agency	52 10 0	
5 per cent. for the securities at Bermuda	937 14 0	
Postage		0 2 3
		209 10 8
Objections on the part of the claimant.		
5 per cent. commission on outfit and expenses	52 5 0	
Allowed on outfit only £864		9 1 0
2½ per cent. ditto on sales of ship	38 10 0	
2½ per cent. ditto on sales of cargo *	662 8 0	
		£200 9 8
Disallowances in former report		1,732 15 2
Allowed consignees by present report		200 9 8
To be accounted for by Messrs. Shedden & Co. and Atkins & Co.		£1,532 5 6

ARDEN, Registrar of his Majesty's High Court of Appeals for Prizes.

The James and William. 1 Acton.

For the claimant, it was objected, in reference to the charges contained in the report, that the captors had unnecessarily incurred the expenses attendant on finding securities, amounting to 937*l.* 14*s.* at the rate of 5*l.* per cent. upon the value of the ship and cargo, which had been sent by the order of the * Vice-Admiralty Court at Bermuda on to England for sale, the proceeds to be deposited in the bank to abide the decision of the Lords Commissioners of Appeal, pursuant to the act of the 41st Geo. III., section the ninth, intituled, "An act for the better regulation of his Majesty's Prize Courts in the West Indies and America, and for giving a more speedy and effectual execution to the decrees of the Lords Commissioners of Appeal." As the claimant had not required security, it was unreasonable the expenses attending the finding securities should make a part of the report. No objection having been made to letting the ship and cargo go on to England without it, there existed no ground for the charge. And finally, the claimant did not admit the usage of granting in such cases a commission of five per cent. for the securities, but considered it perfectly unprecedented. The present was the first case of this nature upon this act which had come before their lordships. An objection was also made to the demand of 163*l.* 1*s.* 8*d.* as the premium of insurance on freight and commission which had not been allowed in the registrar's report, but which was now claimed as a specific and distinct charge upon this property.

For the captor, it was argued — That the provisions of the legislature, requiring security, seemed particularly formed for the purpose of securing the interest of the claimant until final adjudication. No reasonable objection could, therefore, be made by the claimants to this charge, which was very usual, and which effectually protected his property. The insurance, likewise, on the freight was a common charge in all these cases.

* The *Registrar* observed — That the commission charged [* 340] was that usually made on giving security either in the West Indies or this country in all cases of this description.

BY THE COURT.

If, after the captor has obtained possession on finding bail, the claimant wish it to be sent on to England, he must abide the expenses legally incurred, which are in fact the result of his own request.

The James and William. 1 Acton.

The *Registrar* stated — That the reason freight had not been allowed in the schedule was, that the merchants had not considered freight so described, an insurable article.

By THE COURT.

SIR W. SCOTT. Supposing the master had not been also owner, would not freight have been due upon this cargo?

SENTENCE.

The Court directed the registrar's report to be amended, by allowing therein 937*l.* 14*s.* paid the securities at Bermuda, and 163*l.* 1*s.* 8*d.* premium of insurance on freight from Bermuda to England, and on the said sum of 937*l.* 14*s.*

APPENDIX.

EXTRACT *from his Majesty's Proclamation for regulating generally the Distribution of Prizes taken by Vessel's in his Majesty's Service.*

(To which frequent reference is made in the arguments respecting The Diomedæ, page 81.)

WE do hereby further will and direct, that the following regulations shall be observed, concerning the one eighth part hereinbefore mentioned, to be granted to the flag or flag-officers who shall actually be on board at the taking of any prize, or shall be directing or assisting therein. First, that a captain of a ship shall be deemed to be under the command of a flag, when he shall actually have received some order directly from, or be acting in execution of some order issued by a flag-officer; and shall be deemed to continue under the command of such flag, so long as the flag-officer by whom the order was issued, or any other flag-officer acting upon the same station, shall continue upon such station; or until such captain shall have received some order directly from, or be acting in execution of some order issued by, some other flag-officer, or the Lords Commissioners of the Admiralty. Secondly, that a flag-officer, commander-in-chief, when there is but one flag-officer upon service, shall have to his own use the said one eighth part of the prizes taken by ships and vessels under his command. Thirdly, that a flag-officer, sent to command on any station, shall have no right to any share of prizes taken by ships or vessels employed there before he arrives within the limits of such station, and actually takes upon him the command, by communicating orders to the flag-officer previously in command; save only that he shall be entitled to a share of prizes taken by those particular ships to which he shall actually have given

* some order, and taken under his command within the limits of such [* 2] station. Fourthly, that a commander-in-chief, or other flag-officer, appointed or belonging to any station, and passing through or into any other station, shall not be entitled to share in any prize taken out of the limits of the station to which he is appointed or belongs, by any ship or vessel under the command of a flag-officer of any other station, or under admiralty orders; unless such commander-in-chief, or flag-officer, is expressly authorized by the Lords Commissioners of the Admiralty to take upon him the command in that

station in which the prize is taken, and shall actually have taken upon him such command, in manner aforesaid. Fifthly, that when an inferior flag-officer is sent to reinforce a superior flag-officer on any station, the superior flag-officer shall have no right to any share of prizes taken by the inferior flag-officer before the inferior flag-officer shall arrive within the limits of the station, and, moreover, shall actually receive some order directly from him, or be acting in execution of some order issued by him. Sixthly, that a chief flag-officer quitting a station either to return home, or to assume another command, or otherwise, except upon some particular urgent service with the intention of returning to the station as soon as such service is performed, shall have no share of prizes taken by the ships or vessels left behind, after he shall have passed the limits of the station, or after he shall have surrendered the command to another flag-officer, appointed by the admiralty to be commander-in-chief upon such station. Seventhly, that an inferior flag-officer quitting a station (except when detached by orders from his commander-in-chief out of the limits thereof upon a special service, with orders to return to such station as soon as such service is performed) shall have no share in prizes taken by the ships and vessels remaining on the station, after he shall have passed the limits thereof; and in like manner the flag-officers remaining on the station shall have no share of the prizes taken by such inferior flag-officer, or by the ships and vessels under his immediate command, after he shall have quitted the limits of the station, except when detached as aforesaid. Eighthly, that when vessels, under the command of a flag, which belong to separate stations, shall happen to be joint captors, the captain of each ship shall pay one third of the share to which he is entitled to the flag-officers of the station to which he belongs. But the captains of vessels under admiralty orders, being

[* 3] joint captors with other * vessels under a flag, shall retain the whole of their share. Ninthly, that if a flag-officer is sent to command in the out-ports of this kingdom, he shall have no share of the prizes taken by ships or vessels which have sailed, or shall sail, from that port by order from the admiralty. Tenthly, that when more flag-officers than one serve together, the eighth part of the prizes taken by any ships or vessels of the fleet, or squadron, shall be divided in the following proportions; *videlicet*, If there be but two flag-officers, the chief shall have two third parts of the said one eighth, and the other shall have the remaining third part; but if the number of flag-officers be more than two, the chief shall have only one half, and the other half shall be equally divided among the other flag-officers. Eleventhly, that commodores, with captains under them, shall be esteemed as flag-officers with respect to the eighth part of prizes taken, whether commanding in chief or serving under command. Twelfthly, that the first captain to the admiral and commander-in-chief of our fleet, and also the first captain to our flag-officer appointed, or hereafter to be appointed, to command a fleet or squadron of ten ships of the line of battle, or upwards, shall be deemed and taken to be a flag-officer, and shall be entitled to a part or share of prizes, as the junior flag-officer of such fleet or squadron.

Given at our court, at St. James's, the seventh day of July, one thousand eight hundred and three, in the forty-third year of our reign.

**ORDERS issued by his Majesty in Council since the commencement [* 4]
of these Reports.**

No. 1.

At the Court of Queen's Palace, the 21st of June, 1809 ; present, the King's most excellent Majesty in Council.

WHEREAS the time limited by his Majesty's order in council of the fourteenth day of December, one thousand eight hundred and eight, prohibiting the transporting into any parts of this kingdom of any pig-iron, bar-iron, hemp, pitch, tar, rosin, turpentine, anchors, cables, cordage, masts, yards, bowsprits, oars, oakum, sheet-copper, or other naval stores, will expire upon the eleventh day of July next. And whereas it is judged expedient for his Majesty's service, and the safety of this kingdom, that the said prohibition should be continued for some time longer, his Majesty doth therefore, with the advice of his privy council, hereby order, require, prohibit, and command, that no person or persons whosoever, do at any time, for the space of six months, from the said eleventh day of July next, presume to transport into any parts of this kingdom any pig-iron, bar-iron, hemp, pitch, tar, rosin, turpentine, anchors, cables, cordage, masts, yards, bowsprits, oars, oakum, sheet-copper, sail-cloth, or canvas, or other naval stores, or do ship or lade any pig-iron, bar-iron, hemp, pitch, tar, rosin, turpentine, anchors, cables, cordage, masts, yards, bowsprits, oars, oakum, sheet-copper, sail-cloth or canvas, or other naval stores, on board any ship or vessel, in order to transporting the same into any parts beyond the seas, without leave or permission first being had and obtained from his Majesty's privy council, upon pain of incurring the forfeitures inflicted by an act passed in the thirty-third year of his Majesty's reign, intituled, "An Act to enable his Majesty to restrain the exportation of naval stores, and more effectually to prevent the exportation of salt-petre, arms, and ammunition, when * prohibited by proclamation or [* 5] order in council." But it is, nevertheless, his Majesty's pleasure, that nothing herein contained shall extend, or be construed to extend, to any of his Majesty's ships of war, or any other ships or vessels or boats in the service of his Majesty, or employed or freighted by his Majesty's board of ordnance, or by the commissioners of his Majesty's navy ; nor to prevent any ship or vessel from taking or having on board such quantities of naval stores as may be necessary for the use of such ship or vessel during the course of her intended voyage, or by license from the Lord High Admiral of Great Britain, or the Commissioners of the Admiralty for the time being ; nor to the exportation of the said several articles to Ireland, or to his Majesty's yards or garrisons, or to his Majesty's colonies and plantations in America or the West Indies, or to Newfoundland, or to his Majesty's forts and settlements on the coast of Africa, or to the island of St. Helena, or to the British settlements or factories in the East Indies. Provided, that upon the exportation of any of the said articles for the purpose of trade to Ireland, or to his Majesty's yards and garrisons, or to his Majesty's colonies and plantations in America or the West Indies, or to the island of Newfoundland, or to his Majesty's forts and settlements on the

coast of Africa, or to the island of St. Helena, or to the British settlements or factories in the East Indies, the exporters of such articles do first make oath of the true destination of the same to the places for which they shall be entered outwards, before the entry of the same shall be made, and do give full and sufficient security, by bond, (except as hereinafter excepted,) to the satisfaction of the commissioners of his Majesty's customs, to carry the said articles to the places for which they are so entered outwards, and for the purposes specified, and none other; and such bond shall not be cancelled or delivered up until proof be made, to the satisfaction of the said commissioners, by the production, within a time to be fixed by the said commissioners, and specified in the bond, of a certificate or certificates, in such form and manner as shall be directed by the said commissioners, showing that the said articles have been all duly landed at the places for which they were entered outwards. But it is his Majesty's pleasure, nevertheless, that the following articles, namely, bar-iron, white and tarred rope, tallow or mill grease, tarpaulins for wagon-covers, pitch, tar, and turpentine, shall be permitted to be exported, upon payment of

the proper duties, without bond being entered into by the merchant [* 6] exporter, to any of the British * plantations in the West Indies, or to any of his Majesty's settlements in South America; provided the merchant exporter shall first verify, upon oath, that the articles so exported are intended for the use of a particular plantation or settlement, to be named in the entry outwards, and not for sale; and that the said plantation or settlement has not before been furnished with any supply of the said articles during the same season; and provided also that the exportation of the said articles shall, in no case, exceed the value of fifty pounds sterling for any given plantation or settlement, whether by one or more shipments within the same season. And the right honorable the lords commissioners of his Majesty's treasury, the commissioners for executing the office of Lord High Admiral of Great Britain, and the lord warden of the Cinque Ports, are to give the necessary directions herein as to them may respectively appertain. W. FAWKENER.

No. 2.

At the Court at the Queen's Palace, the 12th of July, 1809; present, the King's most excellent Majesty in Council. ●

It is this day ordered by his Majesty, in council, that a general embargo be forthwith laid (to continue until further orders) upon all ships and vessels in the united kingdom of Great Britain and Ireland, except his Majesty's ships and vessels of war, and except such ships and vessels as shall be laden by the especial order, and under the directions of the lords commissioners of his Majesty's treasury, or the Lords Commissioners of the Admiralty, with any kind of provisions or stores for the use his Majesty's fleets or armies; and also except such ships and vessels as are employed by officers of the navy, ordnance, victualing, and customs. And the right honorable the lords commis-

sioners of his Majesty's treasury, and the Lords Commissioners of the Admiralty, and the lord warden of the Cinque Ports, are to give the necessary directions herein as to them may respectively appertain. W. FAWKENER.

No. 3.

[*7]

At the Court at the Queen's Palace, the 12th of July, 1809 ; present, the King's most Excellent Majesty in Council.

WHEREAS his Majesty was, by his order in council of the thirty-first of May, one thousand eight hundred and nine, pleased to direct, that no foreign vessel, except as therein excepted, should enter into the port, harbor, or road lying between the island of Heligoland and Sandy Island, and the shoals of the said islands respectively, and commonly called or known by the names of the North Haven and the South Haven, under any pretence whatever :

His Majesty is pleased, by and with the advice of his privy council, to revoke so much of the said order as respects ships entering into the port of the said island or places thereof in ballast ; and to direct, that, henceforth, merchant vessels, under any flag except the French, coming in ballast, shall be allowed to enter therein without his Majesty's license ; and the right honorable the lords commissioners of his Majesty's treasury, and the Lords Commissioners of the Admiralty, are to give the necessary directions herein as to them may respectively appertain. W. FAWKENER.

No. 4.

At the Court at the Queen's Palace, the 2d of August, 1809 , present, the King's most excellent Majesty in Council.

It is this day ordered by his Majesty in council, that the general embargo laid by his Majesty's order in council, dated the twelfth of last month, upon all ships and vessels in the United Kingdom of Great Britain and Ireland (except as therein excepted) be taken off ; and the right honorable the lords commissioners of his Majesty's treasury, the Lords Commissioners of the Admiralty, and the lord warden of the Cinque Ports, are to give the necessary directions herein as to them may respectively appertain. STEPHEN COTTRELL.

[* 8]

* No. 5.

At the Court at the Queen's Palace, the 16th of August, 1809 ; present, the King's most excellent Majesty in Council.

WHEREAS his Majesty was pleased, by his order in council, bearing date the twelfth of April, one thousand eight hundred and nine, to authorize the governors and lieutenant-governors of his Majesty's islands and colonies in the West Indies, (in which description the Bahama Islands and the Bermuda or Somer Islands were included,) and of any lands or territories on the continent of South America to his Majesty belonging, to permit for twelve months from the date of the said order, subject to be sooner terminated, varied, or altered, in any ships or vessels belonging to the subjects of any state in amity with his Majesty, the importation into the said islands, colonies, lands, and territories respectively of certain articles enumerated in the said order, being the growth or produce of the country to which such ship or vessel importing the same should belong, and also the exportation from the said islands, colonies, lands, and territories respectively, into which the importation of staves, lumber, and provisions shall be made, of rum and molasses, and of any other articles, goods, and commodities whatsoever, except sugar, indigo, cotton-wool, coffee, and cocoa ; provided that such ships or vessels should duly enter into, report, and deliver their respective cargoes, and reload at such ports only where regular custom-houses should have been established.

But his Majesty, with the advice of his privy council, was thereby further pleased to order, that nothing therein contained should be construed to permit, after the first of November, one thousand eight hundred and nine, the importation of staves, lumber, horses, mules, asses, neat cattle, sheep, hogs, poultry, live stock, live provisions, or any kind of provisions whatsoever, into any of the said islands, colonies, lands, or territories in which there should not be, at the time when such articles should be brought for importation, a tonnage duty of not less than five shillings per ton on every ship or vessel bringing the same, according to the admeasurement of such ship or vessel ; nor to

[* 9] permit, after the first * July one thousand eight hundred and nine, the importation of fish into any of the said islands, colonies, lands, or territories in which there should not be, at the time when such fish should be brought for importation, a duty of not less than one shilling sterling per quintal on dried or salted cod, or ling fish, cured or salted : and a proportionate duty per barrel on cured or pickled shads, alewives, mackerel, or salmon, so imported ; and also a tonnage duty to the amount above mentioned on every ship or vessel bringing such fish, according to the admeasurement of such ship or vessel.

And whereas it has been represented, that the legislature of the island of Jamaica have passed an act, imposing the duties hereinafter mentioned on the vessels and produce of the United States of America imported into that island, in addition to another law in force in the said island, laying a duty of two

APPENDIX.

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shillings sterling per quintal on codfish, and a proportionate duty per barrel on pickled shads, and other pickled fish so imported from the United States.

Which new duties are as follows : —

	Current money of Jamaica.
On the vessels, per ton	£0 6 8
On wheat flour per barrel, not weighing more than one hundred and ninety-six pounds net weight	0 6 8
On bread or biscuit of wheat flour, or any other grain, per barrel, not weighing more than one hundred pounds net weight	0 3 4
On bread, for every hundred pounds made from wheat or any other grain whatever, imported in bags, or other packages than barrels weighing as aforesaid	0 3 4
On flour or meal made from rye, pease, beans, Indian corn, or other grain than wheat, per barrel, not weighing more than one hundred and ninety-six pounds	0 3 4
On pease, beans, rye, Indian corn, callivancies, or other grain, per bushel	0 0 10
On rice, for every one hundred pounds net weight	0 3 4
And so in proportion for a less or larger quantity.	
On shingles, called Boston chips, not more than twelve inches in length, per thousand	0 3 4
On shingles being more than twelve inches in length, per thou- sand	0 6 8
* For every twelve hundred (commonly called one thou- [* 10] sand) of red oak staves	0 15 0
For every twelve hundred (commonly called one thousand) of white oak staves, and for every one thousand pieces of heading	0 15 0
For every thousand feet of white or yellow pine, lumber of all descriptions	0 10 0
For every thousand feet of pitch pine lumber	0 15 0
For all other kinds of wood or timber not before enumerated	0 15 0
For every one thousand wood-hoops	0 5 0
And in proportion for less or larger quantity of all and every the articles enumerated.	
Horses, neat cattle, or other live stock, or other goods, wares, and merchandise whatsoever, which by law may be imported into Jamaica from the United States of North America, not before enumerated and taxed, for every one hundred pounds of the value thereof, at the port or place of importation	10 0 0

And whereas the tonnage duty of six shillings and eight pence current money of Jamaica is not equal to five shillings British, required by the said order to be imposed on vessels importing such articles as aforesaid, but such deficiency in the tonnage duty appears to be fully compensated by the duties as aforesaid imposed on the articles imported in such vessels: his Majesty, by and with the advice of his privy council, is thereupon pleased to authorize the governor and

lieutenant-governor of the said island of Jamaica, and the governors and lieutenant-governors of all his Majesty's islands and colonies in the West Indies (including therein the Bahama Islands and the Bermuda or Somer Islands,) and of any lands or territories on the continent of South America to his Majesty belonging, in which duties, equal in amount, when taken together, to those imposed as aforesaid, by the legislature of the island of Jamaica have been, or shall be, granted on the importation of the several articles specified in the said order of the 12th of April, on the vessels importing the same, to permit, notwithstanding any thing in the said order of the 12th of

[* 11] April last, the importation * and exportation into and from the said islands, colonies, lands, and territories, of the several articles mentioned and permitted in the said order of the 12th of April last, for the period thereby allowed, subject to be sooner determined, varied, or altered as therein expressed.

STEPH. COTTELL.

[* 13] * ORDERS, INSTRUCTIONS, &c.

No. 6.

Instructions. September 14th, 1809.

Our will and pleasure is, that vessels under any flag except the French, which shall be proceeding from on board to any port or place between the rivers Swyn and Maese, both inclusive, under a license from the commander-in-chief of our forces in Walcheren, shall not be molested or interrupted, but shall be allowed to proceed on their said voyage, according to the tenor of the said license. And our will and pleasure is, and we do hereby direct, that the commanders of our ships of war and privateers, and the judge of the High Court of Admiralty, the judges of the Courts of Vice-Admiralty, do act in due conformity to and in execution of these our instructions.

No. 7.

At the Court at the Queen's Palace, 20th September, 1809 ; present, the King's most excellent Majesty in Council.

WHEREAS by an act passed in the forty-eighth year of his Majesty's reign, intituled " An Act for further continuing, until three months after the ratifica-

tion of a definitive treaty of peace, an act made in the forty-fourth year of his present Majesty, for permitting the importation into Great Britain of hides and other articles in foreign ships," it is enacted that an act, made in the forty-fourth year of his present Majesty, intituled "An Act for permitting, until the fifth day of May, one thousand eight hundred and five, the importation of hides, calf-skins, * horns, tallow, and wool, (except cotton [* 14] wool,) in foreign ships, on payment of the like duties as if imported in British or Irish ships ;" which, by an act made in the forty-fifth year of his present Majesty, was revived and further continued until the twenty-fifth day of March, one thousand eight hundred and six, and extended to goat-skins imported in foreign ships ; and which was further continued by an act, made in the forty-seventh year of his present Majesty, until the twenty-fifth day of March, one thousand eight hundred and eight, shall be and the same is thereby further continued until three months after the ratification of a definitive treaty of peace : And whereas his Majesty was pleased, by his order in council of the fifteenth day of March last, pursuant to the powers vested in his Majesty by the said act, to allow, for the space of six months from the twenty-fifth day of the said month of March, the importation in foreign ships of any hides, pieces of hides, dressed or undressed, calf-skins, or pieces of calf-skins, dressed or undressed horns, or pieces of horns, tallow, and wool, (except cotton wool,) and goat-skins dressed or undressed, on the terms specified in the said order : And whereas it is judged expedient for his Majesty's service that the said permission should be continued for some time longer, his Majesty is thereupon pleased, by and with the advice of his privy council, to allow, and doth hereby allow, for the space of six months from the twenty-fifth day of this instant September, the importation of any hides, pieces of hides, dressed or undressed, calf-skins, or pieces of calf-skins, dressed or undressed, horns, or pieces of horns, tallow, and wool, (except cotton wool,) and goat-skins, dressed or undressed, in any foreign ship or vessel ; and his Majesty doth hereby order that, on the arrival at any port of the United Kingdom of any foreign ship or vessel, with any of the articles above mentioned, the said goods shall be admitted to entry, on payment of the same duties of customs and excise as are due and payable on the like goods when imported in any British or Irish built ship or vessel ; and the right honorable the lords commissioners of his Majesty's treasury are to give the necessary directions herein accordingly.

STEPH. COTTRELL.

* No. 8.

[* 15]

Instructions. 27th September, 1809.

WHEREAS licenses have been granted, pursuant to the order of his Majesty's most honorable privy council, empowering certain persons to export goods and merchandises therein enumerated from ports of the United Kingdom to

any port of Holland north of the island of Walcheren, and west of the island of Juist, under certain provisions, and with the condition that the said licenses should remain in force for the exportation of the said goods until the twenty-ninth of this instant September, which period has since been extended, in certain cases, to the third day of October, on special grounds stated to render such extension proper.

And whereas it has been represented to us that causes may arise which may prevent divers vessels sailing under the protection of the said licenses from clearing out from the ports of shipment, in such time as may enable them to complete their said voyage on or before the third day of October. We are thereupon pleased, by and with the advice of our privy council, to order, and do hereby order, that all ships which shall sail under the licenses above mentioned, and which shall have cleared out from any custom-house in Great Britain or Ireland, on or before the third day of October, shall be permitted to proceed conformably to the terms of their license, and shall not be molested or interrupted in their voyage by reason only that the time allowed for exportation may have expired previous to their arrival at the ports of destination described in the said license.

And our will and pleasure is, and we do hereby direct, that the commanders of our ships of war and privateers, and the judge of the High Court of Admiralty, and the judges of the Courts of Vice-Admiralty, do act in due conformity to and in execution of these our instructions.

By his Majesty's command,

LIVERPOOL.

[* 16]

* No. 9.

At the Court of the Queen's Palace, the 22d of November, 1809 ; present the King's most excellent Majesty in Council.

WHEREAS the time limited by his Majesty's order in council of the twenty-fourth day of May last, for prohibiting the exportation out of this kingdom, or carrying coastwise, gunpowder or saltpetre, or any sort of arms or ammunition, will expire upon the sixth day of December next : And whereas it is judged expedient for his Majesty's service, and the safety of this kingdom, that the said prohibition should be continued for some time longer, his Majesty doth therefore, by and with the advice of his privy council, hereby order, require, prohibit, and command, that no person or persons whatsoever, (except the master general of the ordnance for his Majesty's service,) do at any time, during the space of six months, to commence from the said sixth day of December next, presume to transport into any parts out of this kingdom, or carry coastwise, any gunpowder or saltpetre, or any sort of arms or ammunition, or ship or lade any gunpowder or saltpetre, or any sort of arms or ammunition, or board any ship or vessel, in order to transporting the same into any parts beyond the seas, or carrying the same coastwise, without leave or permission

in that behalf first obtained from his Majesty or his privy council, upon pain of incurring and suffering the respective forfeitures and penalties inflicted by an act passed in the twenty-ninth year of his late Majesty's reign, intituled "An Act to empower his Majesty to prohibit the exportation of saltpetre, and to enforce the law for empowering his Majesty to prohibit the exportation of gunpowder, or any sort of arms or ammunition; and also to empower his Majesty to restrain the carrying coastwise of saltpetre, gunpowder, or any sort of arms or ammunition;" and the right honorable the lords commissioners of his Majesty's treasury, the commissioners for executing the office of lord high admiral of Great Britain, the lord warden of the Cinque Ports, the master general and the principal officers of the ordnance, and his Majesty's secretary at war, are to give the necessary directions herein, as to them may respectively appertain.

STEPH. COTTRELL.

* No. 10.

[* 17]

Instructions. 6th December, 1809.

Our will and pleasure is, that Swedish vessels proceeding from any port of Sweden, laden with corn, direct to any port of Norway, be allowed to pass without molestation. And that they be allowed also to return from any port of Norway to any Swedish port, without the Baltic, laden with any goods, naval and military stores excepted.

By his Majesty's command,

R. RYDER.

No. 11.

At the Court at the Queen's Palace, the 20th of December, 1809; present the King's most excellent Majesty in Council.

WHEREAS the time limited by his Majesty's order in council of the twenty-first day of June last, prohibiting the transporting into any parts out of this kingdom of any pig-iron, bar-iron, hemp, pitch, tar, rosin, turpentine, anchors, cables, cordage, masts, yards, bowsprits, oars, oakum, sheet-copper, or other naval stores, will expire upon the eleventh day of January next: And whereas it is judged expedient for his Majesty's service, and the safety of this kingdom, that the said prohibition should be continued for some time longer, his Majesty doth therefore, with the advice of his privy council, hereby order, require, prohibit, and command, that no person or persons whosoever do any time for the space of six months, from the said eleventh day of January next, presume to

transport into any parts out of this kingdom any pig-iron, bar-iron, hemp, pitch, tar, rosin, turpentine, anchors, cables, cordage, masts, yards, bowsprits, oars, oakum, sheet-copper, sail-cloth or canvas, or other naval stores, or

[* 18] do ship or lade any pig-iron, bar-iron, hemp, * pitch, tar, rosin, turpentine, anchors, cables, cordage, masts, yards, bowsprits, oars, oakum, sheet-copper, sail-cloth or canvas, or other naval stores, on board any ship or vessel, in order to transporting the same into any parts beyond the seas, without leave or permission first being had and obtained from his Majesty or his privy council, upon pain of incurring the forfeitures inflicted by an act passed in the thirty-third year of his Majesty's reign, intituled, "An Act to enable his Majesty to restrain the exportation of naval stores, and more effectually to prevent the exportation of saltpetre, arms, and ammunition, when prohibited by proclamation or order in council." But it is nevertheless his Majesty's pleasure, that nothing herein contained shall extend, or be construed to extend, to any of his Majesty's ships of war, or any other ships or vessels or boats in the service of his Majesty, or employed or freighted by his Majesty's board of ordinance, or by the commissioners of his Majesty's navy; nor to prevent any ship or vessel from taking or having on board such quantities of naval stores as may be necessary for the use of such ship or vessel during the course of her intended voyage, or by license from the Lord High Admiral of Great Britain, or the Commissioners of the Admiralty for the time being; nor to the exportation of the said several articles to Ireland, or to his Majesty's yards and garrisons, or to his Majesty's colonies and plantations in America or the West Indies, or to Newfoundland, or to his Majesty's forts and settlements on the coast of Africa, or to the island of St. Helena, or to the British settlements or factories in the East Indies: Provided, that upon the exportation of any of the said articles for the purpose of trade to Ireland, or to his Majesty's yards and garrisons, or to his Majesty's colonies and plantations in America or the West Indies, or to the island of Newfoundland, or to his Majesty's forts and settlements on the coast of Africa, or to the island of St. Helena, or to the British settlements or factories in the East Indies, the exporters of such articles do first make oath of the true destination of the same to the places for which they shall be entered outwards, before the entry of the same shall be made, and do give full and sufficient security by bond, (except as hereinafter excepted,) to the satisfaction of the commissioners of his Majesty's customs, to carry the said articles to the places for which they are so entered outwards, and for the purposes specified, and none other; and such bond shall not be cancelled or delivered up until proof be made

[* 19] to the satisfaction of the said commissioners, by the * production, within a time to be fixed by the said commissioners, and specified in the bond, of a certificate or certificates, in such form and manner as shall be directed by the said commissioners, showing that the said articles have been all duly landed at the places for which they were entered outwards; but it is his Majesty's pleasure, nevertheless, that the following articles, namely, bar iron, white and tarred rope, tallow or mill grease, tarpaulins for wagon covers, pitch, tar, and turpentine, shall be permitted to be exported, upon payment of the proper duties, without bond being entered into by the merchant exporter.

to any of the British plantations in the West Indies, or to any of his Majesty's settlements in South America; provided the merchant exporter shall first verify, upon oath, that the articles so exported are intended for the use of a particular plantation or settlement, to be named in the entry outwards, and not for sale; and that the said plantation or settlement has not before been furnished with any supply of the said articles during the same season; and, provided also, that the exportation of the said articles shall, in no case, exceed the value of fifty pounds sterling for any given plantation or settlement, whether by one or more shipments within the same season; and the right honorable the lords commissioners of his Majesty's treasury, the commissioners for executing the office of Lord High Admiral of Great Britain, and the lord warden of the cinque ports, are to give the necessary directions herein as to them may respectively appertain.

W. FAWKENER.

No. 12.

Order. 31st January, 1810.

WHEREAS, certain vessels under the imperial Austrian flag have been detained at Malta in consequence of an embargo, although furnished with his Majesty's license permitting them to trade between the ports of the United Kingdom and ports of the Mediterranean; and whereas, the terms for which such licenses were granted may, in consequence of such detention, have expired or may be so near expiring as not to allow sufficient time for such vessels to complete their respective voyages; his Majesty, by and with the advice of his privy council, is pleased to order, and it * is hereby ordered, [* 20] that the governor, lieutenant-governor, or other person having the chief civil command in Malta, do and shall, in his Majesty's name, extend the term of each of such licenses, either by indorsement on the original licenses respectively, or in any other form that may appear to be most advisable, for a time equal to the time which shall appear to have been lost by the detention of the vessel described in each of such licenses respectively, in consequence of the embargo above mentioned: Provided, however, that such extension of time shall be granted only to vessels trading from or to the United Kingdom, which may require such relief in consequence of detention by such embargo; and that such extension of time shall in no case exceed the time during which the vessel detained shall have been detained by means or in consequence of such embargo. And the right honorable the lords commissioners of his Majesty's treasury, his Majesty's principal secretaries of state, the Lords Commissioners of the Admiralty, and the judge of the High Courts of Admiralty, and the judges of the Courts of Vice-Admiralty, are to take the necessary measures herein as to them may respectively appertain.

(Signed)

W. FAWKENER.

No. 13.

At the Court at the Queen's Palace, the 7th of February, 1810; present the King's most excellent Majesty in Council.

WHEREAS it has been humbly represented to his Majesty, that the islands of Feroe and Iceland, and also certain settlements on the coast of Greenland, parts of the dominions of Denmark, have, since the commencement of the war between Great Britain and Denmark, been deprived of all intercourse with Denmark, and that the inhabitants of those islands and settlements are, in consequence of the want of their accustomed supplies, reduced to extreme misery, being without many of the necessaries and of most of the conveniences of life :

His Majesty, being moved by compassion for the sufferings of these [* 21] defenceless people, has, by and with the advice of his privy * council, thought fit to declare his royal will and pleasure, and it is hereby declared and ordered, that the said islands of Feroe and Iceland and the settlements on the coast of Greenland, and the inhabitants thereof, and the property therein, shall be exempted from the attack and hostility of his Majesty's forces and subjects, and that the ships belonging to inhabitants of such islands and settlements, and all goods, being of the growth, produce, or manufacture of the said islands and settlements, on board the ships belonging to such inhabitants, engaged in a direct trade between such islands and settlements respectively, and the ports of London or Leith, shall not be liable to seizure and confiscation as prize.

His Majesty is further pleased to order, with the advice aforesaid, that the people of all the said islands and settlements be considered, when resident in his Majesty's dominions, as stranger friends, under the safeguard of his Majesty's royal peace, and entitled to the protection of the laws of the realm, and in no case treated as alien enemies.

His Majesty is further pleased to order, with the advice aforesaid, that the ships of the United Kingdom, navigated according to law, be permitted to repair to the said islands and settlements, and to trade with the inhabitants thereof.

And his Majesty is further pleased to order, with the advice aforesaid, that all his Majesty's cruisers, and all other his subjects, be inhibited from committing any acts of depredation or violence against the persons, ships, and goods of any of the inhabitants of the said islands and settlements, and against any property in the said islands and settlements respectively.

And the right honorable the lords commissioners of his Majesty's treasury, his Majesty's principal secretaries of state, the Lords Commissioners of the Admiralty, and the judge of the High Court of Admiralty, and the judges of the Courts of Vice-Admiralty, are to take the necessary measures herein as to them shall respectively appertain.

W. FAWKNER.

* No. 14.

[* 22]

At the Court at the Queen's Palace, the 7th February, 1810 ; present the King's most excellent Majesty in Council.

WHEREAS, by an act made and passed in the forty-sixth year of his Majesty's reign, intituled, "An Act for authorizing his Majesty in council to allow, during the present war, and for six months after the ratification of a definitive treaty of peace, the importation and exportation of certain goods and commodities in neutral ships, into and from his Majesty's territories in the West Indies and continent of South America ;" it is enacted, that from and after the passing of the said act, it shall and may be lawful for his Majesty, his heirs, and successors, by and with the advice of his and their privy council, to permit or to authorize the governors of the said islands and territories, in such manner, and under such restrictions as to his Majesty, by and with the advice of his privy council, shall seem fit, to permit, when the necessity of the case shall appear to his Majesty, with the advice of his privy council, to require it, from time to time, during the present war, and for six months after the ratification of a definitive treaty of peace, the importation into, and exportation from any island in the West Indies, (in which description the Bahama islands and the Bermuda or Somer islands are included,) or any lands or territories on the continent of South America, to his Majesty belonging, of any such articles, goods, and commodities as shall be mentioned in such order of his Majesty in council, in any ships or vessels belonging to the subjects of any state in amity with his Majesty, in such manner as his Majesty, his heirs, and successors, by and with the advice aforesaid, shall direct, whereupon certain orders of council were made on the twelfth day of April, one thousand eight hundred and nine, the sixteenth day of August, one thousand eight hundred and nine, and the tenth day of January, one thousand eight hundred and ten, which orders were made to continue in force for a limited time. And whereas it appears at present to be necessary, to permit for a further limited time, subject to be sooner terminated, varied, or altered, as is hereinafter provided, the importation into and exportation from the islands and * territories of his Majesty [* 23] in the West Indies, (including the Bahama islands and the Bermuda or Somer islands,) and the lands and territories on the continent of South America, to his Majesty belonging, of certain articles, goods, and commodities hereinafter mentioned, in ships or vessels belonging to the subjects of any state in amity with his Majesty ; his Majesty is thereupon pleased, by and with the advice of his privy council, to order, and it is hereby ordered, that the said three orders of council made on the twelfth day of April, one thousand eight hundred and nine, the sixteenth day of August, one thousand eight hundred and nine, and the tenth day of January, one thousand eight hundred and ten, shall continue and be in force until the first day of December, one thousand eight hundred and ten, and that from and after the first day of December, one thousand eight hundred and ten, it shall be lawful for the governor or lieutenant-governor, of any of his Majesty's islands in the West Indies, (in which description the

Bahama islands, and the Bermuda or Somer islands are included,) and of any lands or territories on the continent of South America, to his Majesty belonging, to permit, until the first day of December, one thousand eight hundred and eleven, subject to be sooner terminated, varied, or altered, as hereinafter provided, in ships or vessels belonging to the subjects of any state in amity with his Majesty, the importation into the said islands, land, and territories, respectively, of staves and lumber, horses, mules, asses, neat cattle, sheep, hogs, and every other species of live stock, and live provisions, and also of every kind of provisions whatsoever, (beef, pork, and butter excepted,) and also the exportation from the said islands, lands, and territories respectively, into which importation as aforesaid shall be made of rum and molasses, and of any other goods and commodities whatsoever, except sugar, indigo, cotton wool, coffee, and cocoa; provided always, that such articles so to be imported, except staves and lumber, shall be of the growth or produce of the country to which the ship or vessel importing the same shall belong, and that staves and lumber shall be imported from the country to which the ship or vessel importing the same shall belong; provided also, that such ships or vessels should duly enter into, report, and deliver their respective cargoes, and reload at such ports only, where regular custom-houses shall have been established.

But it is his Majesty's pleasure, nevertheless, and his Majesty, by and with the advice of his privy council, is further pleased to order, and has [* 24] * hereby ordered, that nothing hereinbefore contained, shall be construed to permit, after the said first day of December, one thousand eight hundred and ten, the importation of staves, lumber, horses, mules, asses, neat cattle, sheep, hogs, poultry, live stock, live provisions, or any kind of provisions whatsoever as aforesaid, into any of the said islands, lands, or territories in which there shall not be, at the time when such articles shall be brought for importation, the following duties on such articles being of the growth or produce of the United States of America, namely :

	Sterling Money.
For every quintal of dried or salted cod or ling fish, cured or salted	£0 2 6
For every barrel of cured or pickled shads, alewives, mackerel, or salmon, a proportionate duty.	

	Current Money of Jamaica.
On wheat flour, per barrel, not weighing more than one hundred and ninety-six pounds net weight	£0 6 8
On bread or biscuit of wheat flour, or any other grain, per barrel, not weighing more than one hundred pounds net weight	0 3 4
On bread, for every hundred pounds made from wheat or any other grain whatever, imported in bags, or other packages than barrels, weighing as aforesaid	0 3 4
On flour or meal made from rye, peas, beans, Indian corn, or other grain than wheat, per barrel, not weighing more than one hundred and ninety-six pounds	0 3 4
On peas, beans, rye, Indian corn, callivances, or other grain, per bushel	0 0 10

APPENDIX.

xxv

Current Money
of Jamaica.

On rice, for every one hundred pounds net weight	0	3	4
And so in proportion for a less or larger quantity.			
On shingles called Boston chips, not more than twelve inches in length, per thousand	0	3	4
On shingles, being more than twelve inches in length, per thousand	0	6	8
For every twelve hundred (commonly called one thousand) of red oak staves	1	0	0
For every twelve hundred (commonly called one thousand) of white oak staves, and for every one thousand pieces of heading	0	15	0
* For every one thousand feet of white or yellow pine, lumber of all descriptions. [* 25]	0	10	0
For every thousand feet of pitch pine lumber	0	15	0
For all other kinds of wood or timber not before enumerated	0	15	0
For every one thousand wood-hoops	0	5	0
And in proportion for a less or larger quantity of all and every the articles enumerated.			
Horses, neat cattle, or other live stock, for every one hundred pounds of the value thereof, at the port or place of importation	10	0	0

And his Majesty, by and with the advice of his privy council, is further pleased to order, and it is hereby ordered, that notwithstanding any thing hereinbefore contained, the said permission and authority to import and export shall cease and determine, or be varied and altered before the expiration of the above-mentioned period of the first day of December, one thousand eight hundred and eleven, at the expiration of six months after the notification in the London Gazette, of any order of his Majesty, by and with the advice of his privy council, for revoking, varying, or altering such permission and authority, or shall cease and determine at the expiration of six months after the ratification of a definitive treaty of peace.

W. FAWKENER.

No. 15.

Foreign Office. February 20, 1810.

THE Marquis Wellesley, his Majesty's principal secretary of state for foreign affairs, has this day notified to the ministers of friendly and neutral powers resident at this court, that his Majesty has judged it expedient to direct that the necessary measures should be taken for the blockade of the coast and ports of Spain from Gijon to the French territory ; and that the same will be maintained and enforced in the strictest manner, according to the usages of war acknowledged and allowed in similar cases.

[* 26]

* No. 16.

At the Court at the Queen's Palace, 21st February, 1810; present, the King's most Excellent Majesty in Council.

WHEREAS licenses have been granted pursuant to the order of his Majesty's most honorable privy council, empowering certain persons to import grain, meal, flour, and burr stones, from ports of France and Holland to ports of the United Kingdom : and whereas it has been represented that causes may have arisen, or may arise, which may have prevented, or may prevent, divers vessels sailing under the protection of the said licenses, from clearing out from the ports of shipments in such time as to be enabled to complete their voyage within the time allowed by the said licenses respectively :

His Majesty, by and with the advice of his privy council, is pleased to order, and it is hereby ordered, that all such licenses as aforesaid, (notwithstanding the same may have actually expired,) which shall not have been used for the importation of any such cargo into this kingdom, shall receive the further extension of time hereinafter specified : that is to say, licenses to import the above-mentioned articles from ports between Brest and Bordeaux, the further term of five weeks ; between Boulogne and Conquet, four weeks ; between Slays and Calais, four weeks ; and from Holland, north of the island of Walcheren, or west of the island of Juist, four weeks.

And it is hereby further ordered, with the advice aforesaid, that any vessel coming with the articles aforesaid, and no other, to any port of the United Kingdom, under the protection of any such license heretofore granted, which shall be detained and proceeded against for legal adjudication, shall be immediately liberated, together with the cargo, upon bail being given to answer adjudication.

And the right honorable the lords commissioners of his Majesty's treasury, his Majesty's principal secretaries of state, the Lords Commissioners of the Admiralty, and the judge of the High Court of Admiralty, and judges of the Courts of Vice-Admiralty, are to take the necessary measures herein as to them may respectively appertain.

W. FAWKENER.

[* 27]

* No. 17.

At the Court at the Queen's Palace, the 10th of April, 1810; present, the King's most Excellent Majesty in Council.

WHEREAS, by virtue of the powers vested in his Majesty by sundry acts of parliament, his Majesty was pleased, by his order in council, bearing date the 12th of April last, to allow, and did thereby allow, until the twenty-fifth day of March, one thousand eight hundred and ten, the importation into any port

or place of Great Britain, of certain articles of provision in the manner and under the conditions therein mentioned ; and whereas by an act, passed in the present session of parliament, it is enacted, that an act, made in the thirty-ninth year of his present Majesty, intituled, “ An Act for enabling his Majesty to prohibit the exportation, and permit the importation of corn, and for allowing the importation of other articles of provision without payment of duty, to continue in force until six weeks after the commencement of the next session of parliament,” which was continued by an act of the thirty-ninth and fortieth years of his present Majesty, and amended and further continued by several subsequent acts until the twenty-fifth day of March, one thousand eight hundred and ten, shall, from and after the said twenty-fifth day of March, one thousand eight hundred and ten, be, and the same is thereby further continued until the twenty-fifth day of March, one thousand eight hundred and eleven, except so far as respects the exportation of corn, grain, or flour to Ireland ; his Majesty is thereupon pleased, by and with the advice of his privy council, to allow, and doth hereby allow, until the twenty-fifth day of March, one thousand eight hundred and eleven, the importation into any port or place of Great Britain, of any beans, called kidney or French beans, tares, lentiles, calavancies, and all other sorts of pulse ; and also bulls, cows, oxen, calves, sheep, lambs, and swine, and of beef, pork, mutton, veal, and lamb, (except salted beef and pork,) and of bacon, hams, tongues, butter, cheese, potatoes, rice, sago, sago powder, tapioca, vermicelli, millet seed, poultry, fowls, eggs, game, and sour crout, in * any British ship or vessel, or in any [* 28] other ship or vessel belonging to persons of any kingdom or state in amity with his Majesty, and navigated in any manner whatever, without payment of any duty whatsoever : provided that a due entry shall be made of all such articles as aforesaid, that shall be imported, with the proper officers of the customs at the port where the same shall be imported, under the penalties and forfeitures mentioned and referred to in the said above-recited act, passed in the thirty-ninth year of his present Majesty ; and the right honorable the lords commissioners of his Majesty’s treasury are to give the necessary directions herein accordingly.

STEPH. COTTRELL.

No. 18.

At the Court at the Queen’s Palace, the 2d of May, 1810 ; present, the King’s most Excellent Majesty in Council.

His Majesty is pleased, by and with the advice of his privy council, to order, and it is hereby ordered, that all vessels which shall have cleared out from any port so far under the control of France or her allies, as that British vessels may not freely trade thereat, and which are employed in the whale fishery, or other fishery of any description, save as hereinafter excepted, and are return-

ing, or destined to return, either to the port from whence they cleared, or to any other port or place at which the British flag may not freely trade, shall be captured and condemned, together with their stores and cargo, as prize to the captors.

But his Majesty is pleased to except from this order, vessels employed in catching and conveying fish fresh to market, such vessels not being fitted or provided for the curing of fish.

And it is further ordered, that all vessels subject to the provisions of this order, as aforesaid, which shall have sailed on their present voyage previous to notice of this order, or reasonable time for notice thereof, shall be permitted to return to their own port without molestation, on account of any thing contained in this order; provided they shall not have continued on their

[* 29] fishery as * aforesaid more than twenty-one days (which are hereby allowed to such vessels) after due warning of this order received at sea; and the right honorable the lords commissioners of his Majesty's treasury, his Majesty's principal secretaries of state, the Lords Commissioners of the Admiralty, and the judge of the High Court of Admiralty, and judges of the Courts of Vice-Admiralty, are to take the necessary measures herein, as to them may respectively appertain.

W. FAWKNER.

No. 19.

At the Court at the Queen's Palace, the 2d May, 1810; present, the King's most Excellent Majesty in Council.

WHEREAS licenses have been granted, pursuant to the order of his Majesty's most honorable privy council, permitting the importation of cargoes consisting only of grain, meal, flour, and burr stones, from ports of France and Holland to ports of the United Kingdom:

And whereas by order of council, of the 21st February last, the said licenses were further extended for certain periods therein expressed:

And whereas it has been represented to his Majesty, that it would be expedient still further to extend the term of such of the said licenses as shall not have been used for the importation of any such cargo into this kingdom:

His Majesty, by and with the advice of his privy council, is thereupon pleased to order, and it is hereby ordered, that the term of such of the said licenses granted for the importation of cargoes consisting only of grain, meal, flour, and burr stones, as shall not have been used as aforesaid, shall be renewed and extended till the tenth day of June next, notwithstanding the same shall have actually expired; and the right honorable the lords commissioners of his Majesty's treasury, his Majesty's principal secretaries of state, the Lords Commissioners of the Admiralty, and the judge of the High Court of

Admiralty, and the judges of the Courts of Vice-Admiralty, are to take the necessary measures herein as to them may respectively appertain.

W. FAWKENER.

* No. 20.

[* 30]

At the Court at the Queen's Palace, the 16th of May, 1810 ; present, the King's most Excellent Majesty in Council.

WHEREAS by an act passed in the twenty-eighth year of the reign of his present Majesty, intituled " An Act for regulating the trade between the subjects of his Majesty's colonies and plantations in North America and in the West India islands, and the countries belonging to the United States of America, and between his Majesty's said subjects and the foreign islands in the West Indies," it is, amongst other things, enacted, that it shall and may be lawful for his Majesty in council, by order or orders to be issued and published from time to time, to authorize, or by warrant or warrants under his sign manual, to empower the governor of Newfoundland, for the time being, to authorize, in case of necessity, the importation into Newfoundland of bread, flour, Indian corn, and live stock, from any of the territories belonging to the said United States, for the supply of the inhabitants and fishermen of the island of Newfoundland for the then ensuing season only ; provided always, that such bread, flour, Indian corn, and live stock, so authorized to be imported into the island of Newfoundland, shall not be imported, except in conformity to such rules, regulations, and restrictions as shall be specified in such order or orders, warrant or warrants, respectively, and except by British subjects, and in British-built ships, owned by his Majesty's subjects, and navigated according to law.

And whereas it is expedient and necessary that provision be made for fully supplying the inhabitants and fishermen of the island of Newfoundland, for the ensuing season, with bread, flour, pease, Indian corn, and live stock, and also pitch, tar, and turpentine, his Majesty doth thereupon, by and with the advice of his privy council, hereby order and declare, that for the supply of the inhabitants and fishermen of the island of Newfoundland, for the ensuing season only, bread, flour, pease, Indian corn, and live stock, and also pitch, tar, and turpentine, may be imported into the said island from any of the territories belonging to the said United States, by British subjects, and in British-built ships, owned by his Majesty's subjects, and navigated according to law, * and which, within the space of nine months previous [* 31] to the time of such importation, have cleared out from some port of the United Kingdom of Great Britain and Ireland, or other his Majesty's dominions in Europe, for which purpose a license shall have been granted by the commissioners of his Majesty's customs in England or Scotland, or the commissioners of his Majesty's revenue in Ireland, or any other person or

persons who may be duly authorized in that kingdom respectively, in the manner and form hereinafter mentioned; which license shall continue and be in force for nine calendar months, from the day of the date upon which such license is respectively granted, and no longer; provided that no such license as aforesaid, granted after the thirtieth day of September next, shall be of any force or effect: And his Majesty is hereby further pleased to order, that the master, or person having the charge or command of any ship or vessel, to whom such license shall be granted, shall, upon the arrival of the said ship or vessel at the port, harbor, or place in the said island of Newfoundland, where he shall discharge such bread, flour, pease, Indian corn, live stock, pitch, tar, and turpentine, deliver up the said license to the collector, or other proper officer of the customs there, having first indorsed on the back of such license the marks, numbers, and contents of each package of bread, flour, pease, Indian corn, pitch, tar, and turpentine, and the number of live stock, under the penalty of the forfeiture in the said act mentioned; and the collector, or other proper officer of the customs at Newfoundland, is hereby enjoined and required to give a certificate to the master, or person having the charge or command of such ship or vessel, of his having received the said license, so indorsed, as before directed, and to transmit the same to the commissioners of his Majesty's customs in England or Scotland, or to the commissioners of his Majesty's revenue in Ireland, respectively, by whom such license was granted.

W. FAWCENNER.

Form of License directed by the above Order.

By the commissioners for managing and causing to be levied and collected his Majesty's customs, subsidies, and other duties in [where.]

WHEREAS [name of the person,] one of his Majesty's subjects, [* 32] residing at [place where,] hath given notice to us, the * commissioners of his Majesty's customs [in Great Britain, or revenue in Ireland,] that he intends to lade at [some port of the United States of America,] and import into [some port of Newfoundland,] in the [ship's name,] being a British-built ship, [describing the tonnage and what sort of vessel,] navigated according to law, whereof [master's name] is master, bound to [where]; and it appearing by the register of the said ship the [ship's name,] whereof [master's name] is master, that the said ship [ship's name] was built at [place where,] and owned by [owner's name,] residing at [place where,] all his Majesty's British subjects, and that no foreigner, directly or indirectly, hath any share, part, or interest therein.

Now be it known that the said [person's name] hath a license to lade on board the said ship [ship's name,] at and from any port or place belonging to the United States of America, bread, flour, pease, Indian corn, and live stock, and also pitch, tar, and turpentine, the produce of the said United States, and no other article whatsoever; and to carry the said bread, flour, pease, Indian corn, live stock, pitch, tar, and turpentine, to some port or place in the island of Newfoundland; and on the arrival of the said ship at any port, harbor, or

place of discharge in Newfoundland, the master, or person having the charge or command of the said ship, is required and enjoined to deliver up the said license to the collector, or other proper officer of his Majesty's customs there, and to indorse on the back thereof the marks, numbers, and contents of each package of bread, flour, pease, Indian corn, pitch, tar, and turpentine, and the number of live stock, and shall thereupon receive a certificate thereof from the said collector, or other proper officer of the customs.

This license to continue in force for _____ calendar months from the date hereof.

Signed by us the _____, at the _____, this _____ day of _____, one thousand eight hundred and _____.

License to import bread, flour, pease, Indian corn, live stock, pitch, tar, and turpentine, into the island of Newfoundland.

W. F.

* No. 21.

[* 33]

Foreign-Office, May 20, 1810.

THE king has been pleased to cause it to be signified, by the most noble the Marquis of Wellesley, his Majesty's principal secretary of state for foreign affairs, to the ministers of friendly and neutral powers residing at this court, that the necessary measures have been taken by his Majesty's command, for the blockade of the port of Elsinour, and that from this time all the measures authorized by the law of nations, and the respective treaties between his Majesty and the different neutral powers, will be adopted and executed, with respect to all vessels which may attempt to violate the said blockade.

No. 22.

At the Court at the Queen's Palace, the 16th of May, 1810; present, the King's most excellent Majesty in Council.

WHEREAS the time limited by his Majesty's order in council of the twenty-second day of November last, for prohibiting the exportation out of this kingdom, or carrying coastwise, gunpowder or salt-petre, or any sort of arms or ammunition, will expire upon the sixth day of June next: And whereas, it is judged expedient for his Majesty's service, and the safety of this kingdom, that the said prohibition should be continued for some time longer, his Majesty doth therefore, by and with the advice of his privy council, hereby order, re-

quire, prohibit, and command, that no person or persons whatsoever, (except the master-general of the ordnance for his Majesty's service,) do at any time, during the space of six months, to commence from the said sixth day of June next, presume to transport into any parts out of this kingdom, or carry coastwise, any gunpowder or saltpetre, or any sort of arms or ammunition, [* 34] or ship or lade any * gunpowder or saltpetre, or any sort of arms or ammunition, or board any ship or vessel, in order to transporting the same into any parts beyond the seas, or carrying the same coastwise without leave or permission in that behalf first obtained from his Majesty or his privy council, upon pain of incurring and suffering the respective forfeitures and penalties inflicted by an act, passed in the twenty-ninth year of his late Majesty's reign, intituled, "An Act to empower his Majesty to prohibit the exportation of saltpetre, and to enforce the law for empowering his Majesty to prohibit the exportation of gunpowder, or any sort of arms or ammunition; and also to empower his Majesty to restrain the carrying coastwise of saltpetre, gunpowder, or any sort of arms or ammunition." And the right honorable the lords commissioners of his Majesty's treasury, the commissioners for executing the office of Lord High Admiral of Great Britain, the lords warden of the Cinque Ports, the master-general and the rest of the principal officers of the ordnance, and his Majesty's secretary at war, are to give the necessary directions herein, as to them may respectively appertain.

W. FAWKENEL

No. 23.

Instructions. 20th June, 1810.

Our will and pleasure is, that Swedish vessels employed in the coasting trade from one port of Sweden to another port of Sweden, shall not be molested or detained under the order of the 7th of January, 1807, till further orders; but this instruction shall not construed to extend to vessels trading between the ports of Sweden and Swedish Pomerania.

By his Majesty's command,
(Signed)

R. RYDEL.

At the Court at the Queen's Palace, the 20th of June, 1810 ; present, the King's most excellent Majesty in Council.

WHEREAS by an act, passed in the forty-eighth year of his Majesty's reign, intituled, "An Act for further continuing, until three months after the ratification of a definitive treaty of peace, an act, made in the forty-fourth year of his present Majesty, for permitting the importation into Great Britain of hides and other articles in foreign ships," it is enacted, that an act, made in the forty-fourth year of his present Majesty, intituled, "An Act permitting, until the fifth day of May, one thousand eight hundred and five, the importation of hides, calf-skins, horns, tallow, and wool, (except cotton wool,) in foreign ships, on payment of the like duties, as if imported in British or Irish ships ;" which, by an act made in the forty-fifth year of his present Majesty, was revived and further continued until the twenty-fifth day of March, one thousand eight hundred and six, and extended to goat-skins imported in foreign ships ; and which was further continued by an act made in the forty-seventh year of his present Majesty, until the twenty-fifth day of March, one thousand eight hundred and eight, should be, and the same was thereby further continued until three months after the ratification of a definitive treaty of peace ; and whereas, by the said acts, it is lawful for his Majesty, by his order in council, from time to time, when and as often as it may be judged expedient, to permit any hides, pieces of hides, dressed or undressed, calf-skins, or pieces of calf-skins dressed or undressed, horns, or pieces of horns, tallow, and wool, (except cotton wool,) and also goat-skins, to be imported in any foreign ship or vessel, and to be admitted to entry in any port or place in the United Kingdom, on payment of such and the like duties of customs and excise as are due and payable on the like goods when imported in any British or Irish built ship or vessel, any thing contained in any act to the contrary notwithstanding ; his Majesty is thereupon pleased, by and with the advice of his privy council, and in pursuance of the powers * vested in [* 36] his Majesty by the said above-recited acts, to allow, and doth hereby allow, for the space of six months from the date of this his Majesty's order in council, the importation of hides, or pieces of hides, dressed or undressed, calf-skins, or pieces of calf-skins, dressed or undressed, horns, or pieces of horns, tallow, and wool, (except cotton wool,) and also of goat-skins, dressed or undressed, in any foreign ship or vessel, from any port from which the British flag is excluded ; and that on the arrival at any port of the United Kingdom of any foreign ship or vessel, from any port from which the British flag is excluded, with any of the articles above mentioned, the said goods shall be admitted to entry on payment of the same duties of customs and excise as are due and payable on the like goods when imported in any British or Irish built ship or vessel. And the right honorable the lords commissioners of his Majesty's treasury are to give the necessary directions herein accordingly.

W. FAWKENER.

No. 25.

At the Court at the Queen's Palace, the 20th of June, 1810 ; present, the King's most excellent Majesty in Council.

WHEREAS the time limited by his Majesty's order in council of the twentieth day of December last, prohibiting the transporting into any parts out of this kingdom of any pig-iron, bar-iron, hemp, pitch, tar, rosin, turpentine, anchors, cables, cordage, masts, yards, bowsprits, oars, oakum, sheet-copper, or other naval stores, will expire upon the eleventh day of July next. And, whereas, it is judged expedient for his Majesty's service, and the safety of this kingdom, that the said prohibition should be continued for some time longer, his Majesty doth, therefore, with the advice of his privy council, hereby order, require, prohibit, and command, that no person or persons whosoever do any time, for the space of six months, from the said eleventh day of July next, presume to transport into any parts out of this kingdom any pig-iron, bar-iron, hemp, pitch, [* 37] tar, * rosin, turpentine, anchors, cables, cordage, masts, yards, bowsprits, oars, oakum, sheet-copper, sail-cloth or canvas, or other naval stores, or do ship or lade any pig-iron, bar-iron, hemp, pitch, tar, rosin, turpentine, anchors, cables, cordage, masts, yards, bowsprits, oars, oakum, sheet-copper, sail-cloth or canvas, or other naval stores, on board any ship or vessel, in order to transporting the same in any parts beyond the seas, without leave or permission first being had and obtained from his Majesty or his privy council, upon pain of incurring the forfeitures inflicted by an act passed in the thirty-third year of his Majesty's reign, intituled, "An Act to enable his Majesty to restrain the exportation of naval stores, and more effectually to prevent the exportation of saltpetre, arms, and ammunition, when prohibited by proclamation or order in council." But it is, nevertheless, his Majesty's pleasure, that nothing herein contained shall extend, or be construed to extend, to any of his Majesty's ships of war, or any other ships or vessels or boats in the service of his Majesty, or employed or freighted by his Majesty's board of ordnance, or by the commissioners of his Majesty's navy ; nor to prevent any ship or vessel from taking or having on board such quantities of naval stores as may be necessary for the use of such ship or vessel during the course of her intended voyage, or by license from the Lord High Admiral of Great Britain, or the Commissioners of the Admiralty for the time being ; nor to the exportation of the said several articles to Ireland, or to his Majesty's yards or garrisons, or to his Majesty's colonies and plantations in America or the West Indies, or to Newfoundland, or to his Majesty's forts and settlements on the coast of Africa, or to the island of St. Helena, or to the British settlements or factories in the East Indies. Provided, that upon the exportation of any of the said articles for the purpose of trade to Ireland, or to his Majesty's yards and garrisons, or to his Majesty's colonies and plantations in America or the West Indies, or to the island of Newfoundland, or to his Majesty's forts and settlements on the coast of Africa, or to the island of St. Helena, or to the British settlements or factories in the East Indies, the exporters of such articles do first make oath of

the true destination of the same to the places for which they shall be entered outwards, before the entry of the same shall be made, and do give full and sufficient security, by bond, (except as hereinafter excepted,) to the satisfaction of the commissioners of his Majesty's customs, to carry the said articles to the places for which they are so entered outwards, and for the purposes specified, and none other ; * and such bond shall not be cancelled or delivered up until proof be made to the satisfaction of the said commissioners, by the production, within a time to be fixed by the said commissioners, and specified in the bond, of a certificate or certificates, in such form and manner as shall be directed by the said commissioners, showing that the said articles have been all duly landed at the places for which they were entered outwards. But it is his Majesty's pleasure, nevertheless, that the following articles, namely, bar-iron, white and tarred rope, tallow or mill grease, tarpaulins for wagon-covers, pitch, tar, and turpentine, shall be permitted to be exported, upon payment of the proper duties, without bond being entered into by the merchant exporter, to any of the British plantations in the West Indies, or to any of his Majesty's settlements in South America ; provided the merchant exporter shall first verify, upon oath, that the articles so exported are intended for the use of a particular plantation or settlement, to be named in the entry outwards, and not for sale ; and that the said plantation or settlement has not before been furnished with any supply of the said articles during the same season ; and provided also, that the exportation of the said articles shall, in no case, exceed the value of fifty pounds sterling for any given plantation or settlement, whether by one or more shipments within the same season. And the right honorable the lords commissioners of his Majesty's treasury, the commissioners for executing the office of Lord High Admiral of Great Britain, and the lord warden of the Cinque Ports, are to give necessary directions herein as to them may respectively appertain.

W. FAWKENER.

No. 26.

At the Court at the Queen's Palace, the 27th of June, 1810 ; present, the King's most Excellent Majesty in Council.

WHEREAS licenses have been granted pursuant to the order of his Majesty's most honorable privy council, permitting the importation of cargoes consisting only of grain, meal, flour, and burr-stones, from ports of France and Holland, to ports of the United Kingdom :

* And whereas, by order of council of the 2d. of May last, the said [* 39] licenses were further extended for certain periods therein expressed :

And whereas it has been represented to his Majesty, that it would be expedient still further to extend the term of such of the said licenses as shall not have been used for the importation of any such cargo into this kingdom :

His Majesty, by and with the advice of his privy council, is thereupon pleased

to order, and it is hereby ordered, that the term of such of the said licenses granted for the importation of cargoes consisting only of grain, meal, flour, and burr-stones, as shall not have been used as aforesaid, shall be renewed and extended till the 10th day of August next, notwithstanding the same shall have actually expired. And the right honorable the lords commissioners of his Majesty's treasury, his Majesty's principal secretaries of state, the lords commissioners of the admiralty, and the judge of the High Court of Admiralty, and judges of the Courts of Vice-Admiralty, are to take the necessary measures herein as to them may respectively appertain.

W. FAWKENER.

No. 27.

At the Court at the Queen's Palace, the 18th of July, 1810 ; present, the King's most Excellent Majesty in Council.

WHEREAS licenses have been granted pursuant to the order of his Majesty's most honorable privy council, permitting the importation of cargoes consisting of such articles as are allowed by law to be imported (with certain exceptions stated in the said licenses) from ports situated within the Baltic ; and from Archangel and other ports situated in the White Sea, which licenses will expire on the 29th of September next. And whereas it has been represented to his Majesty, that it would be expedient to extend the term of such of the said licenses as shall not have been used for the importation of any such cargo into this kingdom. His Majesty, by and with the advice of his privy council, is thereupon pleased to order, and it is hereby ordered, that the term of such of the said licenses granted for the importation of cargoes consisting of

[* 40] * articles permitted by law to be imported (with the exceptions stated in such licenses) as shall not have been used as aforesaid, shall be renewed and extended till the first day of January, 1811, notwithstanding the same shall have actually expired. And the right honorable the lords commissioners of his Majesty's treasury, his Majesty's principal secretaries of state, the Lords Commissioners of the Admiralty, and the judge of the High Court of Admiralty, and judges of the Courts of Vice-Admiralty, are to take the necessary measures herein as to them may respectively appertain.

W. FAWKENER.

No. 28.

Foreign Office, August 15, 1810.

THE king has been pleased to cause it to be signified by the most noble

the Marquis Wellesley, his Majesty's principal secretary of state for foreign affairs, to the ministers of friendly and neutral powers residing at this court, that the necessary measures have been taken, by his Majesty's command, for the blockade of the canal of Corfu ; and that from this time all the measures authorized by the laws of nations, and the respective treaties between his Majesty and the different neutral powers, will be adopted and executed with respect to all vessels which may attempt to violate the said blockade.

* No. 29.

[* 41]

EXTRACT of a secret letter written from Holland, on behalf of the Honorable the Court of Seventeen, in Holland, to His Excellency the Governor General in Council in India, dated Amsterdam, the 25th September, 1789. Referred to in pages 287 and 302.

WHEN reports were communicated, in the month of April last, on behalf of their high mightinesses to the Court of Seventeen, that some of the masters of the American ships had spoken something respecting the facility wherewith Batavian spices were to be had, it made a deep impression upon the said court, and spread a great doubt (the court is sorry to say) respecting the integrity of the administrators of the most tender concerns of the East India Company in India ; yet in what degree soever those impressions must have been increased on the minds of us, and of those who take those concerns at heart, you would be able to guess, as, since a short time ago, authentic informations have reached this country that important quantity of spices, and especially of cloves, were imported into America, and thence partly exported to Europe and there disposed of, by which the company is greatly undermined.

We have also received authentic information that considerable quantities of coffee, of Java, were brought by Danish-China ships in Europe, and were immediately sold.

It is undoubtful that such proceedings, when continued, must tend to accomplish the ruin of a trade, which, till this moment, did support itself with the greatest difficulty, and, as it were, is on the brink of its total destruction ; and no wonder that the attention of the sovereign, who generously advanced the money collected from the inhabitants of this country in a peculiar way, was especially directed to this point.

We see, with the greatest dissatisfaction, that by such means the unwearied endeavors of this court for the welfare of the company are crossed and rendered difficult ; and we cannot but look with terror upon the consequences which may arise herefrom, for want of a speedy and efficacious prevention.

* We, therefore, (in the absence of the Court of Seventeen,) cannot [* 42] omit representing the above case to you with the greatest speed, and through an uncommon way, and to lay before you, with the greatest zeal, the impossibility of such transactions taking place, without that in the one or

other part of the administration at Batavia fraud is committed ; and what a prejudicial influence it can be upon the mind of the sovereign, from whom only the means are to be expected for a lasting reparation of the affairs of the company, without reckoning the immense losses which, as we did observe just now, may arise therefrom for the company.

We, therefore, do command you to make a strict inquiry into the means whereby the said masters of American ships, during the last year, as in the beginning of the present one, have got spices at Batavia, and also by what way considerable quantities of Java coffee got into the hands of masters of Danish ships ; and further, in general, whether such prejudicial practices have taken place more.

We rely herein upon your zeal for the concern of the company ; and we also mean that, in such dangerous circumstances, a proof thereof may be expected with right. And we therefore trust that you will use every possible means to come to the truth, and render the case as clear as may answer to our said wishes ; for which purpose we thought proper to treat this cause secretly, and to prevent its becoming public in India, as it may be prejudicial to any inquiries which are to be made by you, as may afford means to offenders to avoid the merited punishment. On which account we also trust that you will, on the receipt hereof, keep a watchful eye upon those to whom the administration of those precious articles was trusted, as well as upon those whose duty it was to watch for the strict observation of the laws enacted against smuggling, whereof masters of strange ships are also reminded as often as they came to Batavia.

A true copy.

(Signed)

J. D. OLDENZEEL,
First Sworn Clerk.

[* 43]

* No. 30.

EXTRACT of a secret letter, written by the Court of Directors at Amsterdam to the Supreme Government at Batavia, dated the 26th April, 1790, and referred to page 303.

THIS Council of Seventeen having seriously observed that the navigation of Americans in India becomes frequent, and, apprehending bad consequences therefrom, the Dutch Company did authorize us to write to you on that point, so as we may deem it requisite.

In consequence of that authorization, we have deemed it necessary to send, for your information, a resolution of their high mightinesses of the 9th November, 1789, with its appendixes ; and we recommend you that you do discharge, in all cases, the obligations attached to decorum, which the concerns between this republic and that nation require, but that you do avoid facilitating their navigation to, or trade in India. And we do charge you that you do suggest

to us, by the first opportunity, what the necessary means are which may be adopted to discourage them from the said navigation.

A true copy.

(Signed)

J. D. OLDENZEEL,
First Clerk.

No. 31.

EXTRACT Patrias general letter, written by the Gentlemen Directors of the East India Company in Netherland to the Government of Batavia, dated Amsterdam, 7th December, 1791 ; referred to page 302.

ALTHOUGH we are yet thinking whether the permission granted to the Americans, supercargoes of the ships The Three Sisters and The Astrea, to bring some goods for sale on shore, * should be taken as a basis, [*44] by other merchants of the said nation, to do such requests also, and thus, in our sentiment, that it will not be without some consequence, nevertheless we will pass your conduct about it, under express orders to reject in future all such requests. We are further of opinion, that the given orders concerning American ships are to all companies, settlements, and thus to Malacca too; and we desire, also, that care should be taken that the same be carried into effect. And as we are generally of opinion that the importation of Europe or America's goods, by ships of foreign nations, is very prejudicial to the interest of the company, and the ships' men ; so we desire that, in future, our given orders concerning the Americans shall be extended to other nations also, and that care shall be taken that thereof notice be given to the men of the ships of the different nations by their arrival, for which purpose we such an order shall send to the Cape of Good Hope also.

Agrees.

(Signed)

J. D. OLDENZEEL,
F. S. Clerk.

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REPORTS

OF

CASES

ARGUED AND DETERMINED

• BEFORE THE

MOST NOBLE AND RIGHT HONORABLE

THE LORDS COMMISSIONERS OF APPEALS

IN

PRIZE CAUSES:

ALSO ON APPEAL TO

THE KING'S MOST EXCELLENT MAJESTY IN COUNCIL.

BY THOMAS HARMAN ACTON, Esq.,

OF THE MIDDLE TEMPLE.

EDITED BY GEORGE MINOT,

COUNSELLOR AT LAW.

VOLUME II.

COMMENCING WITH THE JUDGMENTS IN JUNE, 1809.

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ADVERTISEMENT.

In presenting another volume of these reports to the profession, the editor feels it his duty to apologize for the imperfections of the former, and more particularly for those of the first number. That several of the cases possessed little novelty or interest, he is but too well convinced; and the adoption of a different mode in reporting those of a later date, will sufficiently prove that he was equally conscious of the defect, and anxious to amend it.

The increased value which decided cases have in later years acquired, and the total want of any attempt at reporting the very important and definitive judgments pronounced in the High Court of Appeals, proved to him irresistible inducements to attempt a task of whose difficulty he candidly admits he was not sufficiently aware; this, added to his inexperience at that time in the practice of the court, may probably, in the eyes of a liberal profession, in some degree extenuate the defects of that part of the work. The alterations made in the second number were the result of maturer experience, and the advice of a distinguished ornament of his profession and country, whose name the editor regrets he is not at liberty to mention, but of whose candor and kindness he must ever retain the most grateful remembrance. The second and third numbers contain only cases argued on appeals from the High Court of Admiralty and Vice-Admiralty Courts. The original plan of the work has been in this respect materially altered, and the editor trusts it will meet the wishes of that part of the profession more particularly connected with prize subjects. In reporting those cases, more of the argument of counsel has been given, with a view to enable the reader to ascertain for himself the particular points which may appear to have been decided in the case—a precaution the more peculiarly necessary in reporting these decisions, as in this court judgment is seldom pronounced at length, and the determination of the court is often conveyed merely in the terms of the decree. In all cases, therefore, where it might be attended with advantage, a copy or extracts from the decree have been added. The cases cited in argument have been carefully compared, and in most instances the reasons assigned in the printed cases of the appellant and respondent have been subjoined to the argument.

For the favorable reception the work has already obtained, the editor feels himself deeply indebted to the liberality of the profession, and he is not without confident expectation that the present and future numbers will be found to contain sufficiently interesting matter to induce the profession and the public to continue to these pages that indulgence and protection, to obtain which must ever be to him the subject of extreme solicitude, and an object of the utmost importance.

TEMPLE, May 20, 1812.

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REPORTS OF CASES

DETERMINED IN THE

HIGH COURT OF APPEALS.

BEFORE THE MOST NOBLE AND RIGHT HONORABLE THE LORDS COMMISSIONERS OF APPEALS IN PRIZE CAUSES.

THE AFRICA, Conolly, master.

November 17, 1810.

American slave trade direct to the port of Charlestown, where the vessel would not have arrived prior to January 1, 1808, and consequently was subject to the operation of the American law, prohibiting a traffic in slaves. Condemnation.

AN appeal from the sentence of the Vice-Admiralty Court of Tortola, whereby this American vessel, bound from the coast of Africa, with a large cargo of slaves, to Charlestown, and captured on the 30th of January, 1808, was restored on payment of the costs and expenses incurred by the captors in the maintenance and preservation of this property.

Dallas and *Swaby*, for the claimant, endeavored to distinguish this case from that of *The Amedie*,¹ where the ship and cargo had been condemned by their lordships; in which case it appeared the master had made a deviation from his asserted destination to an American port, and was, at the time of capture, steering for the Havana. The instructions in the present case pointed out a direct return voyage to Charlestown, or "if unable, from contrary winds, to reach Charlestown prior to the 1st of January, 1808, * to make the [*2] first American port which the master could fetch before that

¹ Vol. i. page 240.

day, and report the ship at the nearest custom-house as bound there, but put in by stress of weather, and by so doing the prohibitory act would not attach to The Africa." It was, therefore, understood by American merchants that under such circumstances the American restrictive law would not operate upon this vessel. These instructions were punctually observed; but from a great competition amongst the slave ships on the coast, and the negroes having been attacked by the small-pox, the vessel was unable to make any American port in time, and, therefore, continued her course for Charlestown, without making any deviation. The illegality of the voyage in The Amedie originated in her destination to the Havana, a foreign colony. Here the destination was direct for America, but from unavoidable delays she did not arrive in time.

The *King's Advocate*, contended—That the mere intention of returning prior to the 1st of January was opposed to the fact of her detaining on the coast of Africa until the 16th of December preceding. The completion of the return voyage in time was, therefore, out of the reach of possibility. Neither had this vessel arrived at an American port prior to the first January, and complied with the injunctions of the owner, with a view to take her out of the operation of the American act; admitting, which is highly improbable, that such was the understanding amongst American merchants. The present master only succeeded to the command in consequence of the death of the former, which happened after the capture; and a

material witness, the surgeon, had stated that the former [* 3] master, when overlooking the ship's papers in company with the lieutenant of the capturing vessel, had said, "This is the chart I have to carry me to New Providence," that previous thereto he had never heard where the ship was bound, neither did he know what she was going there for, but apprehended it was to wait for or obtain orders respecting the said ship from the owners. The present master had said, that should The Africa not be admitted to an entry at Charlestown, he believed he should have been ordered by the owner to proceed to the Havana, to dispose of the slaves there. The steward also had sworn he had heard the late master tell the capturing brig commander, that "he did not know; but he should put into New Providence, or something to that effect." Thus the whole transaction had an air of mystery about it, for which there were no doubt most substantial reasons; and although the greater part of the secret had perished with the former master, it would be very easy for the court to determine upon the motives of such concealment on the part of the owners.

The Nancy. 2 Acton.

COURT.

SIR W. GRANT. What are these unavoidable delays mentioned by the claimant's counsel? Is there any mention made of contrary winds, or other impediments to the completion of this voyage within the time limited by the American act, which were not within the control of the party? Certainly this cannot be considered a case which was ever intended by the legislature to be within the reach of indulgence.

SENTENCE.

Pronounced for the captor's appeal, and condemned the ship and cargo, to the sole use of his Majesty, his heirs and successors.

*NANCY, Viall, master.

[* 4]

November 17, 1810.

American slave trade. Deviation from asserted destination for America to St. Thomas, attempted to be justified by sickness of crew and mutiny of slaves. Concealment of enemy's property in slaves on board, though subsequently acknowledged. Condemnation.

A DISTINCTION was made between this and the preceding case by counsel (Dallas); first, that the former appeared to be decided upon the ground that there had not been sufficient time allowed by the master to render her return to America probable previous to the expiration of the period limited by the American act; whereas, in this case, the return voyage from Senegal commenced the 30th September, 1807, providing ample time for her return in conformity with the requisition of the American law; secondly, that, through the sickness of her crew, one of whom expired on the passage, (many more being ill at the time of the capture,) and the apprehensions entertained from the tumultuous disposition of the slaves, who had thrice risen upon the crew, and had been with difficulty subdued, the master was induced to alter his intended destination to Charlestown, and bear away for the nearest port in the West Indies. On the 30th October he discovered the high lands of Spanish town, and considering St. Thomas's most convenient, in the attempt to make that island was captured. The voyage, therefore, had been commenced; and, but for these unfortunate occurrences, would have been completed, conformably with the American law.

The Anne. 2 Acton.

King's Advocate and *Stephen*, objected — That this was in fact a trade from any enemy's port to a port not his own, and, therefore, the master had attempted a trade which, ever since the year 1794, had been declared illegal. To the representation of the mer-

[*5] chants of * South Carolina to the American government, requesting that time might be given them to perfect engagements already entered into in this traffic, since if these vessels should not be able to arrive in time in America they could not, as the law stood with respect to the foreign slave trade, go to dispose of their cargoes at a foreign market, an answer was returned, that it was intended no encouragement whatever should be given to the trade, and, could it constitutionally have been done, it long since should have been stopped altogether; but that at all events, shippers should be left to undertake at their peril any voyages where it was suspected there would be scarcely sufficient time to return before the period appointed by the act. It was remarkable that the master, in making for St. Thomas, must have crossed the trade winds, and passed the latitude of St. Bartholomew and Barbadoes. This was evidently a voyage undertaken to procure the best market he could. In the preparatory examination the master fraudulently had stated the whole cargo to belong to his American owners, but the day after, apprehensive of detection, he corrected himself by admitting that ten slaves had been shipped on freight by a Frenchman. Further proof could not, therefore, be now admitted to distinguish these from the remainder, but the whole property should be considered liable to confiscation.

SENTENCE.

Pronounced against the appeal, and condemned the ship and cargo.

[*6]

*ANNE, Dennison, master.

November 17, 1810.

Slave trade by Americans to a foreign port interdicted by the act of Congress, 1794, prohibiting the foreign slave trade. A claimant for property captured in this trade, notwithstanding the capture was made previous to the British Slave Trade Abolition Act, bound to show that he is protected in such trade by the municipal law of his own country. Application for claimant's costs refused.

THIS was a case of an American ship with a cargo of slaves bound from the coast of Africa (where she had touched at several settle-

ments of different European nations, for the purpose of obtaining slaves) to Monte Video, in South America. In attempting to make this port she was captured, on the 6th January, 1807, and carried for adjudication to the Cape of Good Hope. In the court below, three affidavits were introduced to prove that Monte Video, which the captor's case asserted was at that time blockaded, was not in a state of regular blockade, but that various vessels had been permitted by Admiral Stirling's squadron there cruising, to go up the river Plata; two were added to prove that the settlement of Cape Mount, from whence this cargo was in part or principally procured, was a British factory. The judge had decreed the ship and cargo to be restored on payment of captor's expenses, from which sentence both parties appealed. The case was now argued upon the liability of this vessel to forfeiture under the American law of 1794, prohibiting the foreign slave trade.

Dallas, for the claim. The reason assigned in the claimant's case for restitution, with costs and damages against the captor, is, that "the ship and cargo most clearly appeared to belong to the American citizen for whom they are claimed, and were engaged in lawful trade; and there was no just reason for the capture and detention."

* In deciding this cause it will be only necessary to advert [* 7] to the facts of the case with reference to the American act of 1794, prohibiting a trade in slaves by Americans to foreign settlements. This voyage appears to have commenced in 1806, and concluded by the capture of the vessel in sight of port, on the 7th January, 1807. By these dates it will appear that she had returned nearly a year prior to the operation of the general restrictive law of America, which did not take place until 1808, and nearly three months before the British law¹ for abolishing the slave trade. The question, therefore, for the decision of the court will be, whether the principle recognized by the judgment delivered in the case of *The Amedie*² is to be construed as having a retrospective effect, or in other words, will a British court of prize, acting upon this principle, compel a neutral claimant, whose property has been captured previous to the abolition of the slave trade by the British legislature, to show that he acted under the sanction or protection of the laws of his own country. For obvious reasons it is presumed the court will not authorize such a construction of the judgment alluded to. The

¹ Passed 25th March, 1807, prohibiting the African slave trade from the 1st of May, 1807.

² Vol. i. p. 240.

liability of any vessel to detention and condemnation in our courts originating with the abolition law of Great Britain, a vessel captured prior to the passing of that law, as in the present instance, cannot be considered as subject to its operation, notwithstanding the adjudication had not taken place even after the passing of that act by the British parliament.

[* 8] *The *King's Advocate*, for the captor. In estimating how far the judgment delivered in the case of *The Amedie* may affect the present case, much depends on the terms used by the court in delivering that judgment. It is scarcely necessary to inquire, can our act of parliament affect the positive law of another country? It is absurd to suppose it can. Whatever were the effects and operation of the American act of 1794, they were conclusive as to American merchants. Our act of parliament could not affect that which was independent in itself, and complete long prior to the act of our legislature. There can, therefore, be no question, whether the interdiction was complete. It must have been so originally, without relevancy to our statute. The only mode in which it can be supposed that the Americans might be relieved by our act of parliament, is by supposing notice of the prohibition was thereby intended, and was indeed actually given. The answer to this is, that such notice could only be intended for British subjects. It was not intended, nor could it ever have been considered as a notice to foreigners. They would not have been bound to observe it. The only notice they would have been bound to attend to was that of their own legislature which appears to have been in the present instance equally a notice *de jure* as *de facto*. It would have been held a notice *de jure* on the ground of publication, and *de facto*, as abundant time appears to have elapsed for general communication.

The reasons for condemnation were:—1st, Because the vessel was, at the time of capture, prosecuting a voyage to the colony of the enemy, in violation of the prohibitory laws of America
[* 9] for the abolition of the slave trade, *and is not, therefore, within the provisions of the order of the 24th of June, 1803.

2dly, Because, independent of that prohibitory law, the voyage commencing at Elmina, a Dutch settlement on the coast of Africa, and destined to Monte Video, was illegal.

3dly, Because that destination was pursued in violation of the blockade of Monte Video then existing.

Dallas, in reply, observed, as it had been argued that the ground

The Anne. 2 Acton.

upon which the illegality of this transaction attached was solely in consequence of the previous regulations of America, and as this capture had taken place previous to the British act; supposing this vessel had been brought before the court for adjudication prior to the 25th of March, 1807, when our act passed, could the court consistently have pronounced the vessel and cargo prize? or could those regulations of America have then been adverted to with effect? If no law of ours had been enacted prior to that period there never could have existed a necessity, on the part of the neutral, to show he was within the protection of his own law; which appeared, by the judgment in the case of *The Amedie*, to be that alone which our courts of prize have a right to require of a claimant in similar circumstances. The case before the court was in every respect the same as that stated, except that this vessel had not been brought up for adjudication until the British law had passed; but unless it were intended to give that law a retrospective and *ex post facto* effect, the determination of the court must be the same as if the adjudication had taken place previous to the passing of the British law.

*JUDGMENT.

[*10]

SIR W. GRANT. By the judgment in the case of *The Amedie*, we pronounced the slave trade can have no legitimate existence, except under the particular municipal law of that country to which the claimant belongs. It was then considered, and very explicitly declared, that the trade was altogether unlawful, except so far as it was in the power of the neutral to show this trade was protected by the law of the neutral state. This protection was required to be satisfactorily shown in that case, which not having been complied with, we pronounced sentence of condemnation. Here, also, the claimant must necessarily do the same, and produce the proofs of his protection before he can obtain restitution.

SENTENCE.

Pronounced for the appeal of the captor, reversed the sentence of the court below, decreeing restitution of the ship and cargo upon payment of the captor's expenses, and condemned the ship and cargo.

An application was made for the claimant's expenses, which was also refused.

[* 11] * THE SHIP CARPENTER, Meyer, master.

January 24, 1810.

Brimstone under a false destination from Sicily to Copenhagen but actually to **Marseilles**, not contraband under the particular circumstances of this case. Ship restored. Not to be inferred that it cannot be so in any case.

THIS vessel, with a cargo consisting of brimstone, under American colors, bound from Palma, in Sicily, to Marseilles, (but ostensibly to Copenhagen,) was captured and condemned at Malta as lawful prize. An appeal was prosecuted by the master as to the ship and cargo; but after appearance entered, notice was given by the appellant's proctor, that they had not considered their appeal as applying to the cargo, although by error it had been inserted in the inhibition.

The *King's Advocate*, for the captor. The decision in the court below proceeded upon the principle that the present cargo must be considered, under the circumstances of its destination, as completely within the meaning of the term contraband. The question as to this species of this cargo has never here been formally decided, perhaps never even discussed. The conduct of the parties engaged in the transaction, and the mode of carrying on this speculation, are matter of sufficient curiosity and interest to arrest the attention of the court. The master states he sailed in ballast to several ports of Sicily previous to his arrival at Palma, where his cargo of raw brimstone was shipped for account of Abraham Gibbs, of Palermo, consul of the United States, and actually destined to Marseilles; but finding it impossible to clear out from thence for a French port, an ostensible destination for Copenhagen was adopted. The cargo was consigned to order, and, had the ship arrived at Marseilles, some person

[* 12] would have *applied for the cargo. At the time of the capture there was on board a bill of lading describing the whole cargo as for the sole account and risk of the master, paying no freight, being owners' property, in which a blank was left for the consignee's name. Also a certificate to the following effect. "I, Charles Rowley, Esq., commanding his Majesty's ships in the island of Sicily, certify that I do not consider raw brimstone an article of contraband; and were I to visit a neutral vessel laden with it, I should not detain her. Palermo, 27th April, 1807. Signed C. Rowley." To which was annexed another certificate under the consular seal of the United States, stating that the above was a faithful copy of Captain

Rowley's opinion, certified under his own hand, the original being in the possession of the subscriber, Abraham Gibbs, consul. Under these circumstances, and prepared with these specious instruments, the parties considered the fraud possible, if not practicable, and the ship sailed for Marseilles, which port she was actually taken in endeavoring to enter. Facts such as these make it impossible to consider this particular case as a question to be decided merely upon the strict principle, whether the cargo was contraband or not. The fallacy and deceit practised in this transaction, and to which the agent for the owner was throughout a party, must in themselves lead the court to pronounce sentence on the vessel were the article in dispute merely one *promiscui usus*. But in adverting to the different speculative writers upon this subject, the article of brimstone will be found to have been included upon general principle as a description of contraband, and sometimes enumerated as such in different treaties, by name. Where, however, the article itself appears to be peculiarly adapted for purposes [* 13] of war, it does not seem necessary that it should have been distinctly pointed out by name as contraband; and had it never entered in terms into any of the different treaties between the various powers of Europe, or other parts of the globe, its inherent character and use would necessarily lead to the inference that it must be included within the meaning and intent of the supplemental words usually inserted subsequently, whenever any enumeration has taken place, comprising all other implements and materials of war generally, those general terms being intended to include all articles in their nature adapted for belligerent purposes, although not particularly enumerated. Reasoning from analogy, between this and other articles of a contraband nature, we must arrive at the same conclusion. Bynkershook,¹ treating of contraband articles, says that saltpetre has been distinctly enumerated as such in many treaties, although omitted in others. Yet upon the nature of this article there cannot exist a doubt. It appears to have been an article which attracted the attention of this country at a very early period, and we find it accordingly included as such in an ordinance of Charles the First. If, therefore, an article of at least equal notoriety as contraband of war has been sometimes omitted, in the specific enumeration of some treaties, and, notwithstanding such omission, it has, nevertheless, been always considered to be comprised within the meaning of the general terms concluding the description of such articles, it is

¹ Quæst. Jur. Pub. lib. i. cap. x.

equally fair to infer that the article of sulphur, which is the next material ingredient in the composition of gunpowder, [* 14] * though not always enumerated amongst contraband articles, is no less so on account of such omission, and must be, in like manner, considered to be included within the general terms of such treaties. And in this conclusion we are borne out by facts; for although it is contended that this article of sulphur has not been enumerated in the treaty between this country and America,¹ yet the enumeration of a treaty is by no means to be considered complete, and comprising every thing in its nature contraband, but mentions merely, *exempli gratia*, cannon, saltpetre, and other implements of war generally. In the treaty between America and Holland, made in 1782, and in that between Great Britain and Russia, in 1776, sulphur is distinctly enumerated amongst others. Hence it appears, that although this article has not been introduced into the enumeration of the treaty between Great Britain and America, as we find it in others, we must attribute the omission to a conviction that its general character was perfectly well known. Independently, however, of the particularization of express treaties, this question stands on the general principles of contraband, and must be decided in conformity to decisions of this and other courts of competent jurisdiction. In compliance with these principles, you have determined that tallow bound to Brest, and rosin to a port of naval equipment, are contraband. If this vessel carried but a small proportion of brimstone on board, probably the court would, were there no circumstances of fraud in the case, be disposed to consider the case favorably; but where the whole cargo consists of brimstone, [* 15] no room is left for favorable * construction. An article *promiscui usus* may, perhaps, be permitted to take its character from the port to which it is sent, and the degree of good faith observable in the transaction; but where there can be no doubt of the intention with which this cargo was shipped; where the parties themselves had, at least, their doubts as to its nature; where fraud characterized the inception and conduct of the voyage; where the article itself has been expressly enumerated in some treaties as contraband, and must be considered of too dangerous a nature ever to be purposely omitted whenever enumeration has taken place; the court, without departing from the principles which have guided them on former similar occasions, cannot but consider this present ship-

¹ Definitive treaty of peace between Great Britain and America, signed at Paris, 3d September, 1783.

ment contraband, and affecting the vessel with the penalty of confiscation.

Reason for condemnation — Because the vessel was carrying contraband to a port of the enemy, under false papers.

Arnold and Stephen, for the claim. What has been introduced into the argument of the King's Advocate, from the works of speculative writers, is far too vague to lead the court to affirm the sentence of condemnation of this vessel. And if this part of the captor's case fail, it will most probably prove decisive of their case, as it has been admitted there is not any decision upon record respecting the nature of this particular article. Neither Bynkershoek or Vattel have introduced it into their enumeration of contraband articles. The first concludes his enumeration by the general terms: "*Materia per se bello apta*;" words which can never be supposed to include a raw article, indifferently used in various other manufactures as well as that of gunpowder. No *doubt the reason [* 16] of his omitting brimstone and including saltpetre in his enumeration, was, simply, that the one was found to be expressly prohibited in several conventions, whilst the other was passed over in silence. Indeed but a very scanty proportion, not one twentieth part of the brimstone imported, is used for making powder, compared with the quantity used in the different manufactures of this and other countries. Its general nature and use is described in the Encyclopedia as remarkably serviceable in manufactures for extracting the color out of wool and silk, prior to its being dyed red. It enters into the composition of vitriol, and is consumed in vast quantities in the woollen and silk manufactures of England and France. Its being used in the making of gunpowder is merely incidentally mentioned. Its nature and use cannot, by any analogy, be confounded with that of saltpetre, which is almost exclusively used to make gunpowder. Whenever enumeration takes place in treaties, it is clearly for the purpose of avoiding all possibility of dispute. The omission, therefore, cannot bear a second interpretation. If it has been enumerated in one or more treaties, as in that with Russia, it must be inferred that it is so considered contraband on convention, and not upon principle. As, therefore, it is not originally contraband, not *per se* fitted for war, but has in latter times derived a contraband character from particular conventions, American merchants are to be guided by the treaty entered into between Great Britain and the United States, in which this is not enumerated. Where the court might reasonably have entertained doubts of the character and purpose of a shipment, as in the case of *The Nostra Signora de*

Begona,¹ it was considered that rosin to the port of Nantes, being a mercantile port, was not excluded from the favorable construction *applicable to other articles *incipitis usus*, and restitution was decreed. The arguments founded on the character of the port of actual destination are defective in this, that Marseilles is not a port of military equipment, though certainly not very far distant from Toulon, but a port of considerable commerce, in the neighborhood of which the silk manufacture, in which so much brimstone is consumed, is carried on to a great extent.

It is too much to expect that a false destination, in the present state of the commerce of Europe, when scarcely any trade can be carried on, even by ourselves, but through the medium of false papers, will not only imply *mala fides* in the transaction, but also give a criminal property to the material itself. The asserted destination to Copenhagen was not a falsehood *eo intuitu*, to deceive British cruisers. The master swears the reason he cleared out for Copenhagen was, that it was impossible to clear out for a French port from Sicily; that the cargo was consigned to order, and, had the ship arrived, some person at Marseilles would have applied for it: that he was described as the owner in the bills of lading, as Mr. Gibbs, the real owner, was apprehensive his name might endanger the property from French or Russian privateers. On approaching the port of Marseilles, the destination for Copenhagen was scratched out, and Marseilles substituted. The object of this artifice is satisfactorily made out in proof, which was in part justifiably resorted to, in compliance with a custom-house regulation in Sicily, and subsequently continued to protect the property from enemy's cruisers.

As the cargo was known to be one upon which a doubt might possibly arise, as to its strict character, if searched by a cruiser. [*18] it appears the real owner endeavored *to ascertain, for his direction, the opinion of a British naval officer upon the subject, which, happening to favor his project, a copy was despatched amongst the ship's papers, for the purpose of showing in what light it had been considered by one of his Majesty's commanders.

BY THE COURT.

SIR W. SCOTT. It will be material to consider by whom is this certified. Mr. Gibbs alone states Captain Rowley to have appeared before him, and given such a deposition. The certificate itself was therefore, a document extremely desirable, considering the doubtful

¹ 5 Rob. Rep. 57.

The Ship Carpenter. 2 Acton.

circumstances under which this shipment was made. This statement cannot but be considered as very liable to objection.

Thus it cannot be collected that there was an intention to deceive our cruisers existing in the mind of the proprietor. Any doubts the master, perhaps, might have entertained, were probably removed by the answer received, which is sufficiently explicit, and must have come with peculiar weight from a British commander. He, at least, must be considered innocent in intention, and should recover the ship for his owners, whose property it would be rigorous in the extreme to condemn; being residents in America, altogether unacquainted with the transaction, while the master appears not to have entertained any conviction of the cargo's being of a contraband nature. Under these circumstances, it would not be too much to expect that, had his Majesty's Advocate even succeeded in proving this cargo contraband, the ship should be restored to the proprietors.

Reason for restitution—Because the vessel was fully proved to belong to the American citizens for whom it was claimed, and was engaged in lawful trade.

**King's Advocate*, in reply, observed, that in treaties, it [* 19] would be found enumeration generally took place by way of elucidating the meaning of a preceding classification. Bynkershoek¹ had said that saltpetre had often been mentioned in treaties and conventions as contraband where powder itself had been omitted. Yet no doubt existed about the nature of the one or the other. Of brimstone, as little doubt could be entertained, particularly when the large quantity was considered, two entire cargoes being shipped by this same Mr. Gibbs, at the same time, and for this port, so close in the neighborhood of Toulon, notoriously a naval depot. In the present times, when all things had undergone so striking a change by the violent measures of the enemy, the definition of contraband used by old writers, ought to be abandoned, or, at least, the terms *per se* omitted. There could be little doubt that both Mr. Gibbs and the master

¹ The passage before and here alluded to, is to be found in his Quæst. Jur. Pub. lib. i., c. x.: De nitro salpetre magis dubitari posset, quia per se materiem belli non præstat, et tamen salpetre continetur omnibus fere, quos indicavi catalogis rerum prohibitarum, nam ex nitro maxime fit pulvis bellicus, præcipuus nunc belli fomes. Quin animadverti, nitrum sæpe exprimi, omisa mentione pulveris bellici, sæpe etiam ea addita. Ubi omisa est, ipsum nitrum succedit loco pulveris bellici, ubi addita, pro synonymis habentur, nisi nitrum ob præcipuum ejus in bello usum, exceperint gentes a materiis per se bello non aptis. Quæst. Jur. Pub. lib. i., c. x.

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were perfectly well aware of the purposes for which this commodity was intended in France. And by submitting a case for the opinion of Captain Rowley, it seemed they only wished to know, was he as wise as themselves; if not, they supposed there was a good chance of effecting their illegal purpose. Unfortunately for the owners of the ship, no favorable distinction could be drawn between the conduct of their agent and their own.

[* 20] * JUDGMENT.

SIR WILLIAM GRANT. In this case, we admit the claim for the ship. By this decision, it is not to be understood that brimstone cannot be contraband in any case, but merely, that it is not contraband under the circumstances of this case.

SENTENCE.

Pronounced for the appeal, and reversed the sentence appealed from; therein retained the principal cause, admitted the claim for the ship, but pronounced no freight or expenses to be due to the neutral master.

THE TOPAZ, Nicoll, master.

February 9, 1811.

Resistance to the exercise of the right of visitation and search.

An armed American vessel, having carried on the forced trade on the Spanish main, and while under a British flag, seized some vessels for the purpose of ransoming part of the crew which had been detained on shore, &c., on arriving off Macao, attempts to resist a British cruiser in the exercise of the right of visitation and search, captured, after a desperate resistance.

Condemnation.

AN armed American schooner, condemned in the Vice-Admiralty Court, of Bombay, for resistance to the exercise of the right of search, by his Majesty's ship Diana, in Macao Roads, in China.

This schooner having been equipped for, and employed in, the forced trade on the Spanish main, arrived at Macao, where an attempt was made to search her, by the boats of The Diana, in consequence of information given by some of her crew, who had entered on board The Diana, that she had committed various acts of piracy under a British flag, during her cruise upon the Spanish main. A desperate resistance was made by the master and crew, in which the

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former was killed, several of both parties wounded, and the vessel captured. An appeal from a sentence of condemnation was prosecuted, on the presumption, that as the right of search had been previously submitted to peaceably, the search, in the present instance, had been attempted vexatiously in an improper manner, and also in an improper place, namely, within * the limits of the [* 21] neutral Portuguese territory or roadstead of Macao.

King's Advocate, for the captors. The circumstances developed in the preparatory examinations of this case, fully justify the captor in the exercise of the right of search, which right the claimant now attempts to invalidate, by a long train of evidence, introduced to prove that the captured vessel was situated within the territorial limits of the Portuguese settlement of Macao. The question of territory has, however, been most attentively considered by the court below, which, from its proximity to the scene of action, must have had more satisfactory means of ascertaining the validity of this objection, than any we can obtain. The judge appears to have most judiciously referred the question respecting the local situation of this vessel, with the ship's papers, logs, &c., to the decision of three respectable nautical men, under the superintendence of the registrar; the substance of their report is, that upon examination it appears that the soundings of Macao reach upwards of ten miles from the town; that the term, Macao road, is quite undefined, meaning only the anchorage ground between Macao and that range of islands of which Samcock and Tycock are the principal, which is open anchorage; that from the log-book of The Topaz, it appears that The Topaz lay in four and a half fathom water; that soundings of four and a half fathoms do not come nearer Macao than about four miles, nor nearer the Nine Islands, which are desert rocks, than three miles; that, upon the whole, from the evidence, it would appear, that the position of the schooner was about five miles from Macao, five and a half miles from Cabretto Point, four * and a half miles from a point forming the [* 22] opposite side of the entrance to the Typa, and at least three miles from the Nine Islands; that upon the 6th day of August, 1807, the brig Diana lay with Macao town bearing north-west by west four or five miles, and the Nine Islands north by east half east; that at this time The Diana must have been about two miles and a quarter from Cabretto Point, the nearest land; that next day, being the 7th August, The Topaz came to anchor north-east by north, three and a half miles from The Diana; that in the afternoon of that day The Diana shifted her berth to the north-east, but how far the log-book does not specify, nor can the reporters discover by other means; that

this motion carried her still farther from the nearest shore, and nearer to The Topaz; in this situation, she was moored at daylight in the morning of the 8th; in the afternoon the boats went to board The Topaz, and eventually took possession of her; the schooner Topaz having just got under weigh when taken, was then carried towards The Diana, and at five in the afternoon brought to anchor with Macao town north-west by north, The Diana bearing east north-east, and Cabretto point south by west; that, upon the whole, they report that The Diana, on the 6th, and part of the 7th of August, was about two miles and a quarter from Cabretto Point, and in the evening of the 7th moved farther from that point and from the land in a north-easterly direction, but find it impossible to report how much, having no data.

By a subsequent report, upon inspecting some additional surveys of the harbor of Macao, and the river Typa, made by order of the East India Company, they, in all respects, confirm the former [* 23] report, except that *the said survey would make The Diana somewhat less than a half mile nearer to Cabretto Point: before she shifted her berth on the afternoon of the 7th, and thus make her to have been somewhat less than two miles from Cabretto, but from her afterwards shifting her station, find it impossible to state her actual place at the time of fitting out the boats.

There appears, in the appellant's case, nothing satisfactory to overturn the inference to which these reports must necessarily lead, except the vague testimony of some sailors on board, who speak with much diversity as to her situation at the time of capture; one stating it to be two miles from the shore, and seven from Macao; another, one mile from the shore, and town of Macao; a third, two and half from shore, and four from Macao. From such evidence, especially when given by part of the captured vessel's crew, little can be safely inferred. The difficulty of ascertaining distances at sea with any precision by the eye, also renders it expedient to prefer charts, logs, and soundings, with the calculations of experienced seamen, to any evidence deduced from sight, which is extremely liable to deception. The inference, therefore, to be drawn from these reports is, that this vessel was totally out of the protection of neutral territory, and, therefore, liable to search; nor was her distance materially altered by the unavailing attempt it appears she made to clear The Diana's boats, and get into the Typa. She had only hoisted sail when the boats boarded.

Dismissing this part of the case with observing, that no remonstrance was then or has been since made to the detention and seizure of this vessel by the Portuguese governor, which affords a strong pre-

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sumption that no violation of territory was even suspected, it *will appear that the design and conduct of this voyage, [* 24] or piratical cruise, (as it may be termed,) imperatively called upon the commander of his Majesty's brig to investigate the complaints which had reached him through the medium of some of the *Topaz's* crew, which had entered on board the brig. From the preparatory examinations, it appears the vessel sailed from Baltimore for the north-west coast and a market, well armed, and provided with French, English, American, and other colors. Her cargo consisted of linen, dimities, muslins, &c. The master was enjoined by instructions from one of the owners, Mr. Taylor, "to avoid speaking with, and not voluntarily to throw himself into the way of other vessels; to resist if attacked by any other vessel whatever, and to fight his own way." The master had also repeatedly said he would suffer none to board while a man was alive. The conduct of the voyage perfectly accorded with the nature of these preparations and instructions. She directed her course to the Spanish main, where she committed various piratical acts, boarding Spanish vessels, forcing them to contribute to her wants, taking possession of them in order to procure her papers, which, in one instance, had been detained when sent on shore, or with a view to procure the release of part of her crew, which had been seized on account of previous enormities committed on the coast. At Monte Christo, a landing was made to plunder the town, which was repulsed, with the loss of twelve of the crew. The master described his vessel frequently as an English privateer, and English colors were hoisted. During her expedition to the Spanish main, it is stated, she obtained by these illegal means, and the sale of one third of her cargo, a very valuable return cargo, consisting * of valuable metals, plate, and specie.¹ It is submitted, [* 25] by the reasons in the case,

1st. That "there is no sufficient proof that the property of the cargo belonged lawfully to the claimants;

And 2dly, That the ship and cargo are subject to condemnation for resistance to search, by which many persons have been wounded, and other deplorable consequences have ensued."

Adams and *Stephen*, for the claimants. Notwithstanding the first reason assigned in the captor's case, no substantial objection has been offered as to the property of this vessel and cargo, in opposition

¹ 65 tons of copper, 65,000 dollars, 146 lbs. silver plate, 325 lbs. silver in pags, and some gold.

to the concurrent affidavits of the asserted owners and several of the crew. This part, therefore, of the case may be taken as proved. The remaining question is one of the most delicate nature, and upon your decision thereon depends the fate of an extremely valuable vessel and cargo. What has been urged upon the propriety of the intervention on the part of the Portuguese government on a claim of territory, is to us, and to the merits of this case, immaterial. It is one thing to attempt to invalidate a capture on a claim of territory, and another to say that, geographically speaking, the search was attempted within the neutral territory. The remissness or neglect of the neutral government cannot deprive a claimant of his rights, however such a government may be disposed to abandon its own. This vessel must necessarily be considered to be in the harbor of Macao, upon the faith of the protection afforded by the neutral territory, a protection [* 26] founded *on the justest principles, and long sanctioned by the law of nations.

This vessel appears to have been engaged in what is commonly denominated the forced trade, which is not unusually carried on with similar circumstances of deceit and violence, because it is almost impossible it could be otherwise. For acts like these the parties therein engaged cannot, morally speaking, justify themselves; but it cannot be doubted that this trade, and its accompanying circumstances, are by most nations considered politically justifiable. In the present circumstances of European commerce, the most glaring deceit is daily practiced to facilitate the introduction of British manufactures. This, though of a much later date, must still be considered perfectly justifiable in a political point of view.

The right of visitation and search has ever been considered by neutrals as most invidious, and has been repeatedly the source of remonstrance and contention. But the exercise of this harsh right upon one neutral, within the territory and protection of another, is a grievance not to be endured. All authorities of earlier date have uniformly maintained the principle; and Mr. Jenkinson, whose opinions are very familiar to later times, pursuing the reasonings upon this subject in his work entitled "Conduct of Great Britain in respect to Neutral Nations,"¹ states as an incontrovertible truth, "within the precincts of the dominion of any government you are not at liberty to search the ships of any country." A most important object, therefore, with all nations must be the inviolability of the protection of their territory. The road of Macao is formed by the river Typa emptying itself into a narrow arm of the sea, on one side inclosed by

¹ Liverpool's Collection of Treaties, vol. i. p. 6.

the main land, on the other by the range called the Nine * Islands, something like Spithead, several parts of which [*27] also are full three miles distance from the contiguous lands; yet no one ever supposed Great Britain would endure that foreign vessels should be visited and searched by others while lying within such a road. Three witnesses on board allege her distance from the Portuguese territory was within three miles at farthest, and all on board agree she was within the territory of the settlement when the search was last attempted. To get rid of this positive swearing, reports are obtained from some ships' captains, to whom the vessel's papers, logs, &c., have been referred; which cannot but be considered much more vague and conjectural than any evidence afforded by persons upon the spot, who were eye-witnesses of the whole transaction. Yet even these reports establish the claimant's case. The Nine Islands must be considered part of the territory of Macao, as it forms part of the harbor or roads which are there said to be very indefinable, extending even ten miles from the town. The report adds, the prize was at anchor within five miles of Macao, that is higher up the river than the capturing vessel, therefore, within the roads, and the exercise of this right cannot be considered legal. The instructions were not found on board; but it is proved the master was required by them not to molest but avoid all other vessels, but to resist in case of attack, as was perfectly justifiable. The whole management of this unfortunate affair has been extremely objectionable. If suspicions were excited, as The Topaz lay in a land-locked place, and the town was provided with a fort and troops, had an application been made to the governor, representing the circumstances, and he had considered it necessary, the search might have taken place without bloodshed, or the violation of territory. But the *captor [*28] does not avail himself of the constituted authorities, but takes the whole affair into his own hands; pays first one visit, and then another, as appears by the petition of appeal, both which were peaceably submitted to; a third is attempted by the commander of the brig in person, with the brig's boats well manned and armed. This third visit assuming the appearance of an hostile boarding, the master was bound by his instructions to resist; but first endeavored, by making sail up the river, to get clear of the boats. This certainly is not the mode of exercising the right of visitation and search which courts in this country will be induced to uphold, upon a mere statement that some sailors had communicated information respecting these alleged piratical transactions on the Spanish main. The evidence of these deserters was extremely suspicious; and this gone-by transaction, however properly it might have been a subject for representation

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from the Spanish to the American government, was not one which called for the unsought interference of a British officer in the East Indies. If these depredations ever had been carried on partly under our flag, it was then properly a subject of representation from the British to the American government only, and by no means within the scope of his official duty. But another reason is furnished by one of these sailors, who states, that the last time the brig's boats went for wages due to some of his comrades, who had entered on board the brig. In this he is corroborated by the evidence of the surgeon of The Topaz, who adds, the master had refused to pay an arrear of wages due to one of them. British ships of war, it is well known, exercise this privilege of enforcing the payment of wages

owing by the masters of British vessels to seamen entering [*29] * on board his Majesty's ships, but by what right they may be privileged to act as collectors, and enforce the payment of such alleged debts by neutral masters, remains yet to be explained. If the right is not distinctly proved, resistance to it cannot fairly be visited by penal consequences, and the confiscation of this very valuable property. It is remarkable, too, that one witness states the brig's boats first fired on The Topaz's crew who were endeavoring to make their escape. The whole tenor of the evidence might lead to a suspicion that these violent means were resorted to in order to provoke a resistance which might in some sort justify the capture. The claimant appears to be in that situation that he may require the captor to propound the whole of the right by virtue of which he acted. We deny what is presumed by the captor, that the exercise of this right was legal. Upon this presumption alone depends the whole of the captor's case. The burden of proof rests, therefore, with him; but the fair presumption is against the party. The weakness of his case, and the doubtful evidence adduced, must throw proportionable strength into the scale with the claimant. If we can only bring the question to a state of doubt, that doubt should prevail in our favor. If still the court should be of opinion enough has been shown by the captor to substantiate part of his case, and that more accurate information as to the territorial limits of the settlement would be desirable, further proof may be required; the best mode of obtaining, which would probably be through the medium of the custom-house of Macao, to show how far the territory of the settlement is considered by the Portuguese government to extend.

[*30] * *King's Advocate*, in reply, contended — That it was perfect competent to any British officer to detain even forcibly this vessel, on receiving intelligence that she had for a long time been

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engaged in a sort of piratical cruise, during which she had frequently assumed and thereby degraded the British flag. The resistance made originated in consciousness of guilt; and it was remarkable, one of the witnesses on board stated, that the master had avowed his intention to dispose of the vessel as a privateer at the Isle of France, which resolution was attributed by another to the apprehensions entertained lest the transactions on the South American coast might have been represented to the American government. In the case of *The Washington*, a vessel fitted out for a slave voyage, sailing from a port in this country, and amenable to the laws enacted relative to the slave trade, it was proved resistance had been made, and this court had condemned the vessel.¹ If the objection here

* taken on the question of territory were available, and no [* 31] right of search allowed to the extent here contended for, it could never be known how far the belligerent's right might be safely exercised with respect to the seizure or detention of neutral vessels under suspicious circumstances. The first visit was merely for the purpose, it appeared, of examining the protections of the crew, not to search the vessel. This made no material alteration in the case. It had been erroneously assumed, that the right of visitation and search was confined to the high seas. This doctrine had been directly contradicted by their lordships' own rules. With respect to the proposed proof from Macao, it could not but be objectionable, as such could only with propriety be received in support of a claim of territory, which had never been made.

¹ *Washington*, Adams, Lords, June 3, 1809. A case of an American vessel bound from Liverpool to the coast of Africa on a slaving voyage, for account of several British proprietors, and from thence to the port of Charlestown for delivery. In the river of Congo she was boarded by *The Prince of Orange*, private British ship of war, and sent to Surinam for adjudication, for having on board contraband of war, which it appeared she had obtained from a British ship while on the coast of Africa. On the voyage to Surinam she was again taken possession of by the boats of his Majesty's ship *Epervier*, but on the captors proceeding to adjudication the ship and cargo were restored. An appeal was prosecuted before the lords commissioners, where the captors availed themselves of a fresh ground for condemnation, namely, that after she had been captured and sent towards a port for adjudication, the master and crew had attempted to rescue the vessel, and had actually taken measures for arming themselves, and compelling the prize-master and crew to quit the prize in an open boat. It appeared in evidence that the master had endeavored to obtain the key of the arm-chest for the purpose of arming the crew, and but for a discovery of their design, the rescue would have been attempted. Upon the ground of attempted rescue and unneutral conduct, their lordships, therefore, it would appear, pronounced for the appeal, and condemned the ship and cargo as lawful prize to the captors.

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Stephen distinguished the resistance made from that proved in *The Washington*; which was a deliberate conspiracy to retake the ship after capture, and the crew were very fortunately prevented from turning the prize-master and his crew adrift into the Atlantic in an open boat.

The *King's Advocate* submitted — That the consequences of an attempt to rescue a prize, and an actual resistance to the exercise of a legal belligerent right were equally fatal.

SENTENCE — 2d May.

Pronounced against the appeal, and affirmed the sentence of the court below, condemning the ship and cargo.

[* 32] * GOEDE HOOP, Van Thuysen, master.

March 21, 1811.

Removal of neutral or British property from islands or settlements ceded to a foreign state which became subsequently hostile.

A vessel under a Dutch flag, with a Dutch pass, and bound from the Cape of Good Hope to St. Helena, America, Amsterdam, or London, as the supercargo should consider most eligible, but originally purchased by a merchant residing at the Cape, for the account of British merchants desirous of removing their property to their own country, by means of which purchase, by a domiciled Dutch merchant, the vessel acquired all the advantages of Dutch character. Ship condemned.

Essentially necessary to show the intention of the shippers to be that of absolute removal of themselves and their effects, previous to obtaining restitution of property shipped on board the above vessel. Restitution of part of her cargo, where such intention had been carried into effect.

IN the Vice-Admiralty Court of Barbadoes this ship and cargo, under Dutch colors, pass, and sea-brief, bound from the Cape of Good Hope to the West Indies, America, or Amsterdam, as the supercargo should consider most conducive to the interest of the proprietors, and claimed as the property of several persons by birth British subjects, but latterly resident at the Cape of Good Hope, whilst in the possession of the Dutch, had been condemned under the following circumstances.

The claimant in the original cause, Mr. John Carey, a British subject, in his affidavit, stated that, having himself considerable property at the Cape of Good Hope, he was, in July, 1799, deputed by several

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British subjects, merchants in this country, as their attorney, to transact their respective business, and recover various demands, claims, and debts due to them by different persons residing at the Cape of Good Hope, during the period the said settlement was in possession of the British forces, previous to the peace preceding.¹ The claimant went out to the Cape, then in possession of Great Britain, and continued there, transacting business for himself and others, until the settlement was ceded to the Batavian republic; and having then collected considerable property, with which he was desirous of returning to England, (the exportation of specie from thence having been prohibited, * and it being impossi- [* 33] ble to obtain good bills on English merchants,) he, jointly with Mr. Joseph Bray, William T. Venables, and Leith Alexander Davidson, British merchants then at the Cape, who were also desirous of removing part of their property to Great Britain, purchased the ship Goede Hoop for the sum of 1,000 guineas from the present master, also a British subject, and entered into an agreement, stipulating that they conjointly should provide a cargo, amounting in value to 30,000 rixdollars, for which cargo and ship they should provide in the following proportions: Mr. Carey in two fifths, Messrs. Bray and Venables in two fifths, and Mr. Davidson in one fifth thereof. The vessel, with her cargo, was to proceed under the conduct of Mr. Carey, as supercargo to St. Helena, there to dispose of part of her cargo, and take in East India goods, and thence to sail for America, Hamburg, Amsterdam, or England, as the supercargo should think most advisable for the interest of the several proprietors, and the voyage to be terminated, the vessel disposed of, and the accounts made up, on the vessel's arriving at Amsterdam or England. For this agency the respective parties were to pay Mr. Carey certain commissions. By the examinations and affidavit of Mr. Carey, it appeared that the parties interested in this ship and cargo considered "it would be materially advantageous, as it was then a time of apparent peace between Great Britain and Holland, to vend the exports that should be procured at the Cape of Good Hope in a Dutch settlement, where there was an absolute certainty of disposing of the said ship to greater advantage than in England; and, therefore, procured a Mr. Amyott, of the firm of Amyott, * Simpson, & Co., of London, nominally to make [* 34] the said purchase for them." He (Mr. Amyott) having solely for commercial purposes, (as Mr. Carey stated,) and to be of

¹ Signed at Amiens, 1802.

service to his own state, as well as his own affairs, resided for about the last three years at the Cape, "where he had obtained some degree of consideration, and was considered as a burgher;" by which means the vessel was entitled to carry a Dutch flag, an object of considerable importance, as she had formerly been a prize condemned in India, had a pass extending only to the Indian Ocean, and was, therefore, liable to interruption by British cruisers in the proposed voyage. The purchase, however, by Mr. Amyott and bill of sale were, as stated by Mr. Carey and the master, altogether nominal, no money having been paid by him to the former owner of the vessel, the real and true sale being made by Mr. Van Thuysen to Messrs. Carey, Bray, Venables, and Davidson. Amongst the ship's papers there was a power, executed by said Amyott, to dispose of the vessel, which was, Mr. Carey adds, provided merely to prevent any difficulty that might arise upon the subsequent intended sale of this vessel in Europe. Mr. Carey adds, that fearing "the term of three years, which it was by the treaty of Amiens stipulated should be granted to all individuals of the respective nations which had been previous to that time at war, in order to collect or remove their debts and effects from the ceded countries or settlements, would prove insufficient for accomplishing the extensive affairs of his constituents; and being known to the commissary general of the states at the Cape, he was induced (it being then a period of peace) to procure a burgher's brief, or license, to go from or return to the

[* 35] Cape at any * further time he might find necessary; which was, as he stated, the sole purpose and inducement he then had in applying for the same." The whole property on board, with the exception of one cask of ironmongery, the property of Mr. Amyott, was provided by the aforesaid parties to the above agreement. The claimant in the court below, in addition to the facts here stated, suggested, in his answer to the captor's libel, that the ship and cargo claimed was protected by his Majesty's order in council of the 1st of June, 1803; providing that all vessels under the flag of the Batavian republic, coming from any of the colonies late in the possession of his Majesty, but restored by the treaty of peace to the Batavian republic, which, together with the goods on board, were the property of his Majesty's subjects, should be delivered to the British owners, or their agents, upon affidavit that such vessel and goods were their property at the time of sailing and detention, and upon sufficient bail being given to abide the adjudication.¹ Among the ship's papers were letters of instruction, from

¹ These are the words of the answer itself. It, however, does not appear any order

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Davidson & Co., and Bray, Venables, & Co., directing Mr. Carey to pay the proceeds of the brig and cargo as soon as realized, to their agents in London; a bill of sale of the brig, by Van Thuysen to Amyott, and Dutch license to Amyott, as owner; a receipt by Amyott for 1,050*l.*, *from Bray, Venables, Carey, and [*36] Davidson, in full for the brig. The judge pronounced sentence of condemnation on the ship and cargo, 4th February, 1804.

On an appeal to the lords commissioners, 7th August, 1807, the reasons adduced on condemnation, by the counsel for the captors, were: "Because the vessel was navigating in a Dutch character, and the asserted owners of ship and cargo are to be considered as Dutchmen; 2dly. Because the claim is not established by the evidence, with respect to the property." That for restitution was: "Because the evidence proves the property of the ship and cargo to belong to British subjects. And the ship's being sent out under the Dutch flag and pass is accounted for by the situation of the owners and their property, and, under such circumstances, should not prevent their obtaining restitution of it." Their lordships affirmed the sentence condemning the ship, pronounced for the appeal respecting that part of the cargo claimed on behalf of John Carey and Alexander Leith Davidson, and decreed the same to be restored; but directed further proof as to the national character of Bray and Venables. An affidavit of Joseph Bray, sworn at Boston, May, 1808, was brought in, stating that, on going to the Cape, in 1797, when the place was possessed by Great Britain, he entered into partnership with Mr. Venables, and they carried on trade there under the firm of Bray & Venables. On the cession of the Cape to the Dutch, he was anxious to remove his property, and became a party to the agreement respecting this vessel and cargo, the proportion of which claimed for him (one fifth) was actually his property. That he continued at the Cape, but being still anxious to remit his property from the Cape of Good Hope, *which he had hitherto [*37] been unable to do, on account of the absolute impossibility of procuring good bills of any description, and because the revival of war was then known at the Cape, (in order to make arrangements for remitting his said property as securely as possible from seizure or capture by his Majesty's enemies,) found himself obliged, in the year 1804, to come to Boston, North America, whence, in the same year,

of this description issued on the 1st of June. It is most probable the order alluded to was no other than the instruction of the 2d of July, 1803, issued for the protection of British property coming from countries and islands ceded to the Dutch by the late peace, and sailing before they had received notice of the renewal of hostilities.

he returned to the Cape, where the exigencies of his affairs compelled him to remain till the 1st or 2d day of May, 1805, when he again took his departure from thence in the ship *Eliza*, for Boston, North America, at which place he arrived in the month of July following, and where he has constantly resided since. And he further made oath, that he had never been domiciled in the territory of any of his Majesty's enemies, or of their allies.

SENTENCE.

The court decreed restitution of the property claimed on behalf of the claimant, Mr. Joseph Bray.

The property claimed for Mr. Venables had been condemned for deficiency in the further proof introduced as to his national character, on the 13th May, 1809.

[* 38] * THE TWO BROTHERS, Seabury, master.

(Appeal from Ceylon.)

March 21, 1811.

A voyage, as asserted, from Marseilles to Tranquebar, but actually to the Isle of France, under pretext of distress, which was not sufficiently established, held to be a voyage originally destined from Marseilles to the Isle of France, and, as such, not entitled to a more favorable construction than that applied to the coasting trade of the enemy under false papers.

THIS vessel, under American colors, sailing from Marseilles, and bound ostensibly to Tranquebar, but captured attempting to enter the Isle of France, was, with her cargo, consisting of provisions, fruit, liquors, &c., condemned as "carrying on an illicit trade between Marseilles, a port of the French republic, and the Isle of France, a colony of the said republic; and further, the said cargo being the property of and belonging to persons inhabiting within the territories of the said republic."

King's Advocate, for the captor, stated the facts of the case. The voyage commenced at Baltimore, from whence the vessel sailed to Leghorn, disposed of a cargo of coffee and sugar, and sailed in ballast to Marseilles. By the original letter of instructions, the master had

orders to return in ballast direct to Baltimore ; a subsequent letter directs him to proceed to Marseilles, procure a suitable cargo, agreeably to directions forwarded by the owners to the consignee at Leghorn, and clear out for Tranquebar, and should he there meet with a market suitable to his expectations, a return cargo of coffee was to be purchased at Batavia, Moka, or the Isle of France. In compliance with these orders, the vessel performed her voyage to Leghorn and Marseilles, and in the prosecution of the asserted voyage to Tranquebar, was captured, bearing * up for the Isle of [* 39] France, under the pretence of sickness among the crew, a deficiency of water, and the badness of the spars aloft. These pretexts appear to have little more than a shadow of foundation. That in some degree they existed is not disputed ; two of the crew died, one continued sick. There are entries in the log stating that two casks of water had leaked out ; that there were only forty gallons on board, twenty of which were contained in a cask in which several rats had been drowned ; that both top-sail yards had sprung aloft ; and having no wood on board, the master resolved to steer for the Isle of France. As the master was perfectly aware of the extreme danger he incurred by entering that port, it is impossible to account for his running this extraordinary risk, but by concluding that the actual motive for such a deviation was the great advantages he expected to derive from the sale of such a cargo as he had on board, consisting of all the luxuries of France. But it is ascertained by the evidence of two officers of the capturing vessel, that upon examining the casks alluded to, the water was found drinkable ; and there were in the casks upwards of sixty gallons. Another circumstance of a very suspicious nature is, that, by the admission of the master, it appears he never had been at Tranquebar before ; and yet was not consigned to, or furnished with instructions to any merchants there ; he was, according to the letter of instructions, to endeavor to obtain a market for the cargo. The suspicions which are thus excited, with respect to the actual intended destination of this vessel, have been all confirmed by the discovery of several packages of letters addressed to various persons * residing in the Isle of France [* 40] and Bourbon, all which were artfully concealed in the bottom of a case containing umbrellas. One of these is directed to Mr. Buchanan, American consul at this island, whom the master admits to be brother of one of his owners. These facts must be decisive of the false destination of this vessel. The voyage appears to have originated in the idea of deriving considerable advantages from interfering in the trade between our enemy and the colony. Indeed, a trade so circumstanced as this, may be considered very fairly in the same

light as carrying on the coasting trade of the enemy. Geographically speaking, it may be considered an abuse of the term, but in point of law, it must be liable to all the objections attendant on the interference in the enemy's coasting trade, and hence, equally subject to the penalty of confiscation of ship and cargo. The house at Leghorn to whom the vessel had been consigned, appears, from the master's evidence, to have had a more than ordinary interest in this intended voyage to the enemy's colonies; this is conspicuous from the style of the correspondence as to the lading and consignment of this vessel when she should arrive at Marseilles. Purviance, one of the partners of this house, is admitted to have been formerly clerk in the house of a part owner of this vessel. To him, therefore, the consignment had been made very confidentially, and by him again made to a house at Marseilles, with which it does not appear these owners had previously any dealings. These admissions strongly point to an enemy's interest in the property taken in at Marseilles, which is attempted to be

[* 41] * supported by papers and attestations stating the whole to be neutral property.

Reasons for condemnation.

1st. Because the voyage being from Marseilles to the Isle of France, under a colorable destination to Tranquebar, it is to be considered on the same footing as the coasting trade of the enemy, which would, under such circumstances, subject the property to condemnation.

2d. Because the proofs of property in such a transaction must be held to be insufficient, and the parties are not entitled to the benefit of further proof.

Dallas and *Stothard*, for the claimants and appellants, contended the property was satisfactorily proved by parol evidence, and most unexceptionable documents, to be exclusively in the appellants. No present connection whatever in trade was proved to exist between Purviance, at Leghorn, or Buchannan, at the Isle of France, and the owners. The property was, therefore, unimpeached. The destination was open and avowed, from the commencement of the voyage even from America. In cases of intended concealment of destination, some slight instances of incautiousness, or, at least, the inconsistencies of different witnesses, were scarcely ever wanting to point out the actual destination. But here, no such traces of fraud could be discovered. The vessel was detected avowedly sailing for the Isle of France, as appeared by her log, which also stated her reason for such deviation to be a sickness of the crew, and a want of water

[* 42] and wood. * On all hands it has been admitted, there was but a very miserable supply of water, and whether amount-

The Two Brothers. 2 Acton.

ing to sixty or twenty gallons, it must be considered altogether inadequate for the remainder of the voyage. As to the legality or illegality of entering the Isle France under these circumstances, two questions naturally arose; the first, whether a mere touching there for the purpose of refreshment, be illegal? and *non constat*, that any thing more was intended or necessary; and, secondly, whether an intention to trade there would affect this vessel and cargo with the penalty of confiscation? Upon this latter question, there appeared to be tolerable strong authority in the decision of the court in the case of *The Patapsco*,¹ where the court held, that the captors had not established that part of his case which asserted, that a trade from Batavia to the Isle of France, was illegal. It had been there attempted to be shown that these places were of a strict colonial nature; but this part of their case having failed, the court decreed restitution. This case appeared to be strongly assimilated in its circumstances to that of *The Patapsco*, and several others which then followed the decision in that case. What had been urged as to the culpability of these parties, on the ground of its being an interference in the coasting trade, appeared to be a confounding of the meaning of the very simplest terms. To suppose an island in the Indian ocean a part of the *terra firma* of France, was absurd; yet nothing less could possibly serve the captor's case, and convert this deviation into the coasting trade of this country.

* JUDGMENT.

[* 43]

SIR W. SCOTT. This was a case of an American ship sailing with papers purporting a voyage from the port of Marseilles to that of Tranquebar; but our view of the circumstances of this case, is that the original and intended destination of the vessel was from Marseilles to the Isle of France; and that the distress set up as an excuse for deviating to the Isle of France, is merely fictitious. We are, therefore, of opinion that a transaction of this nature is not entitled to a more favorable rule than that usually applied to the coasting trade of the enemy, when carried on by a neutral under false papers; and, therefore, decree condemnation of the property.

SENTENCE.

Pronounced against the appeal, affirmed the sentence of the court below, condemning the ship and cargo as lawful prize to the captors.

¹ 1 vol. 270.

[*44] * THE CORA, Van Allen, master.

May 2, 1811.

Case of a vessel with a cargo taken in at one port of the island of Java and proceeding to another, with an intention (as asserted) to procure from the latter place a clearance, and proceed to America with such cargo, held to be a trading within the order 7th January, 1807. The presumption being, that she was going to the latter port for the purpose of discharge. Ship and cargo condemned.

An appeal from the sentence of the Vice-Admiralty Court at Bombay, condemning this American ship, and a return cargo of coffee, taken on board at Samarang, in the island of Java, the proceeds of her outward cargo, consisting of provisions, wine, oil, olives, &c., laden at New York, and disposed of at Batavia, where she took in some Sapan wood for dunnage, from which port she had sailed without a regular clearance for Samarang, but by means of an order to the guard-ship stationed off that port, giving her a permission to pass. On returning from Samarang with this cargo to Batavia, for the purpose (as asserted) of obtaining a clearance for America, and proceeding with her cargo to New York, the capture took place. The sentence of the court below proceeded upon the illegality of this description of trade by neutrals.¹

[*45] * *King's Advocate* and the *Attorney-General*, for the captor. Upon several different and distinct grounds, this property appears liable to condemnation, any of which will probably be sufficient, if established, to support the captor's case. On the 12th of March, 1807, she sailed from New York with a cargo of provisions for Batavia, with instructions to the master and supercargo to deliver the cargo to a Mr. Law, supercargo of another American vessel, belonging to the claimants, which it was supposed would previously have arrived at Batavia. This Mr. Law was intrusted with the sole management of the vessel and cargo by the owners, who appear to have calculated upon his wishing the vessel to make a voyage to

¹ In the Vice-Admiralty Court at Bombay, March 2, 1808, the Hon. Sir James Mackintosh, pronounced the said brig, with the goods, &c., therein laden, "were rightly and duly taken and seized; the same being captured while in the prosecution of an unlawful voyage from Samarang (a port belonging to the Batavian republic, enemies of his Majesty, and shut to neutrals in time of peace) to Batavia; and also for carrying on trade between two ports belonging to the enemy, contrary to his Majesty's instructions, and as such, or otherwise, ought to be accounted and reputed liable and subject to confiscation, &c."

■ The Cora. 2 Acton.

some other port or ports in India. In conformity with their wishes, the vessel, after discharging part of her cargo at Batavia, where she arrived in June following, sailed to Samarang, another Dutch settlement in Java, where the remainder of her cargo of provisions was sold, and a cargo of coffee taken on board, with which she sailed for Batavia. Upon these facts alone, therefore, this voyage is clearly within the meaning of his Majesty's order in council, 7th January, 1807, "prohibiting a trade from one port to another, both which ports shall belong to or be in the possession of France or her allies, or shall be so far under their control, as that British vessel may not freely trade thereat." The account given of this voyage from Batavia to Samarang, and the motives which are assigned for undertaking it, are of the most suspicious nature. Notwithstanding the vessel had a supercargo on board, she was consigned to another at Batavia, with an unlimited permission to engage the vessel in any *scheme he might consider eligible. Hitherto the Dutch [*46] government had, with an extreme jealousy, prohibited all intercourse with these settlements by foreign merchants, except through the medium of Batavia alone, which being the seat of government, it would be regulated according to its wishes and political interests. *Guarda costas* were stationed along the island to prevent any such trade. The coasting trade was thereby exclusively confined to the vessels of these settlements, which, with the armed vessels formerly stationed off the coast, have, since the commencement of the war, been all captured or destroyed. The difficulties which the Dutch government encountered in carrying on the trade between the different neighboring Dutch settlements and Batavia, rendered it necessary the restrictive policy which had obtained during periods of peace should be relaxed, and neutrals were, therefore, (as in the present instance,) permitted to be the carriers of those commodities, which it was otherwise impracticable to remove to the general market for exportation. Upon this ground, also, the captors are entitled to a sentence of condemnation, as this vessel appears to have illegally engaged in a trade which, during peace, was prohibited to neutrals; and your lordships have repeatedly decided, that a neutral state shall not avail itself of any temporary relaxation of colonial restriction, uniformly enforced during peace, to facilitate its commercial communications during war, or evade the rights of a belligerent. This is, therefore, a trade to a port from which, during peace, an American would have been excluded. Besides which, there are circumstances in the transaction which directly point out that *the government of Batavia itself had an interest, if not the [*47] entire property in this shipment. By the letters of instruction

to the supercargo, he was empowered, "if he could obtain any advantageous employment for the brig, to accept it." The vessel sailed for Samarang by the special permission of the government, and did not enter or clear out from the ports of Samarang or Batavia in the usual manner. The outward cargo, of which it is said the present is the proceeds, amounted in value to about \$9,000, whilst the invoice of the return cargo states its value at \$28,000 and upwards. These circumstances, taken collectively, necessarily induce a suspicion of the property being in part or altogether that of the enemy, especially as it appears the same parties have disposed of another of their vessels at Samarang. The probability is, that the sale or transfer of this vessel took place at Batavia, from whence she proceeded, colorably, as an American, to Samarang, and was returning to discharge her cargo at Batavia. From the unlimited confidence reposed in Mr. Law's discretion, this might all have been effected without any possibility of obtaining further evidence of the transaction. The order of the 7th of January is strictly applicable, and the voyage must be primarily considered to be from the port of shipment to the port of destination. Sometimes that, however, may be dismissed, but not without the most unequivocal proof that such was not the port of ultimate and actual destination. In the case of *The Neutrality*, Gardner,¹ argued here, which was a case of a voyage from a port in the Mediterranean, touching at Alicante, but with an alleged destination to America, it became a serious consideration whether, upon

[*48] * the change of port, the property would not be affected.

Restoration, however, was decreed, it having been clearly ascertained, that no trade to the port of Alicante had been in contemplation; but at the same time an intimation was given by the court, that a touching at such a port would in some cases affect the property of the ship.

Dallas and *Arnold*, for the claimants. The doubts now entertained with respect to the property, formed no part of this case in the court below, nor can they here, unless the oaths of the master and supercargo, proved by various documents, all supported on oath, be set aside upon mere conjecture. The order of 7th January applies to a "trade" between ports both in possession of France or her allies, &c. To bring this vessel within the order, the fact of trading must be either established or proved to have been in contemplation. The capture prevented an actual trading, and the oral testimony of the

¹ Lords, Sept. 26, 1808.

The Cora. 2 Acton.

master and supercargo, together with the letter of instructions from Mr. Law, at Batavia, to the master, distinctly state the destination of the vessel was ultimately to America, merely calling at Batavia on his return from Samarang.¹ * By this letter [*49] it appears Mr. Gerard, the supercargo, had deposited funds with the company for a cargo of coffee, and agreed, to save time, that the vessel should proceed to Samarang, and there take in as much as could be obtained, the deficiency, if any, to be completed on her return to Batavia. This fully accounts for the vessel's not regularly clearing out from Batavia. The arrangements were all made with a view to despatch, and Mr. Law's superior information induced his owners to intrust him with the superintendence of all their concerns; the supercargo of this ship being comparatively unacquainted with the trade of those places. All the evidence rebuts the imputed intention to trade between these ports. Many cases have come before this board, of American vessels arriving at one port in Europe, and finding no sales, have, without taking in any additional cargo there, proceeded to a second, and such voyages have not been considered a trading, or within the restrictions of the order. So many of this description of cases have occurred, that we have ceased to argue the question. When the former adjudication was made, a decision had taken place in the Vice-Admiralty Court of Malta, that the mere sailing from one port to another in the possession of the enemy brought a vessel within the * meaning of [*50] the order, which has since been exploded.

BY THE COURT.

SIR W. SCOTT. Is not this vessel, by your admission going from

¹ Captain Van Allen.

"Dear Sir,

Batavia, 28th August.

"On your arrival at Samarang I presume you will find there Mr. Gerard, supercargo of your brig, who, you know, left here on the 18th for that place, having deposited here funds with the company sufficient to load the brig with coffee, agreeing to take it to Samarang, in order to make despatch in being ready to proceed to New York, and save laying a long time at this place. The company, not knowing whether there may be enough coffee on hand at Samarang to load the brig, have given an order, which you carry, to receive all on hand, or a full load; they agree, however, if there is not sufficient, that you are not to delay for it, but on your return here you shall immediately receive enough to complete your load, and be able to proceed to New York; and as Mr. Gerard will wish to stop here to complete the business relative to the sale of his cargo, it may be of no disadvantage should you not get full entirely there.

"I am your's, sincerely,

"W. LAW."

Samarang to Batavia? The point now in controversy is, must not this trade be considered the coasting trade of these settlements.

King's Advocate. There was even a part of a cargo, consisting of Sappan wood, put on board at Batavia prior to her sailing to Samarang.

But which, it appears, never was sold at Samarang; therefore, between these two ports no trade was carried on. This constituted part of her return cargo for the American market, for which the residue, consisting of coffee, was peculiarly adapted. In cases of suspicion the evidence in the cause must be tried by its probability. This description of cargo had been particularly recommended by the owners as the most advantageous for their market. Upon suggestion by the captors that Samarang was a close port, the judge below had directed an inquiry; the captors adduced evidence, that although Batavia was open, Samarang was a close port. But whether a close or open port makes no difference as to the applicability of this order, which makes no distinction between ports closed or open to other nations in time of peace. But the decision proceeded upon the assumption that this was a trading to Batavia, and, therefore, illegal. That question had not been decided, as it has since been at this board, in the case of the *Patapseo*,¹ in which case it was [* 51] held by your lordships such trade was not illegal. 'The presumption, however, is not that a ship going from one port to another (especially in these seas, and upon long voyages) is going for purposes of trade.

COURT.

SIR JOHN NICHOLL. I do not recollect any case of a vessel, with goods laden in an enemy's port, and going to another in the possession of the enemy, which has not been considered as a trading.

SIR WILLIAM SCOTT. It certainly is the presumption she is going for purposes of trade, but this may be repelled by evidence.

It should be observed, that although this coffee was taken on board at Samarang, it appears to have been laden at Batavia. This very cargo would have been laden at Batavia had it not been for the

¹ Vol. i. p. 270.

The Cora. 2 Acton.

anxiety of the master to return to America. A special permission was, therefore, obtained to save time. It was necessary to return to Batavia to clear out to America, which it does not appear she could have done at Samarang. The same construction has been put upon the trading at Matanzas and the Havanna which have here, by your lordships, been held to be the same trade.

King's Advocate, in reply. The general presumption of law is strongly against the claimant, and although the order mentions trading in one part of it, it was never meant to imply extensive commercial concerns alone. Indeed, in the subsequent terms of the order there is something equivocal, which, if not mildly construed in the first instance, would probably have led to an interdiction of *all communication whatever between such ports. It is a [* 52] restriction in the nature of a blockade. Is there, then, to be found a case of breach of blockade, where the court, applying a general order by general rules of presumption, has stooped to accommodate its determination to particular avowed objects on the part of the claimant? This would be, indeed, a dangerous practice. Hence in all blockade cases, we find this court has decidedly set its face against pleas founded solely upon intention as far too liable to abuse. The *dictum* of the court in the case of *The Neutrality* was most positive, although only a *dictum*, which is not always to be considered binding, and that particular case was excepted, not by probability or presumption of intention, but by the fact that she had gone in, and without attempting to trade there, proceeded on her way to America. A case occurred here of a vessel¹ from the Spanish Main, with a cargo of cocoa, bound, by her papers, to a port in America, but actual captured going into Curacoa. The court considered it was not competent in this equivocal state to admit a plea of intention that she was going in for the sole purpose of landing a passenger, the master's brother. Applying, therefore, these principles to the facts of the case, there is enough to show this communication was illicit. These parties, it is also to be observed, have sold one ship to the Dutch government; there is, therefore, even the less probability of her actual intention to return. Another ground of condemnation is disclosed in the admission of the supercargo, that in their trip to Samarang they had carried out some Dutch gentlemen, amongst others Mr. Cowell, who is said by the master to have had rank in the Dutch navy, and, in fact, has in that character *taken pri- [* 53]

¹ George, Pullinger, Lords, November 17, 1809.

The Diana. 2 Acton.

soners some persons now in court. A conduct highly illegal, and such communication must be considered at least tantamount to trading. You have always held proof of this kind conclusive, and only capable of being rebutted by positive facts.

The court took time to deliberate.

JUDGMENT. — July 25, 1811.

SIR W. SCOTT. This was a case of an American vessel, which, after disposing of her outward cargo at Batavia, proceeded from thence to Samarang, another Dutch port in the island of Java, where she took in a cargo of coffee, with which she was proceeding back to Batavia, when the capture took place. The presumption is, therefore, that she was going to Batavia for the purpose of discharging her cargo, which is not rebutted by the evidence in the cause. The trade must, therefore, be considered as part of the coasting trade of the enemy; and the ship and cargo, in conformity with his Majesty's order in council, liable to confiscation.

SENTENCE.

Pronounced against the appeal, and affirmed the sentence of the court below, condemning the ship and cargo.

[* 54]

* THE DIANA, Ledesma, master.

May 16, 1811.

License trade from Cuba to New Providence. The voyage not being completed within the time limited by the license, owing to detention by the enemy's privateers, from a suspicion of having a British license on board, and the vessel subsequently deviating from the regular course to obtain provisions. Ship and cargo restored, notwithstanding it appeared the date of the license had been altered, though without the master's knowledge.

THIS was a case of a British schooner which had been captured by the enemy, and after condemnation in the island of Cuba, purchased for account of British merchants residing in New Providence, and laden with sugar, bark, &c., for account of the master and another Spanish subject.

A license was procured for this vessel by the master from the Spanish government at Cuba, to carry on the coasting trade there. Another license was also obtained from the governor of the Bahama

Islands, to pass with certain articles therein enumerated, from the port of St. Jago de Cuba to Nassau, in the island of New Providence, which was to be in force for sixty days from the 24th day of March, 1807. The latter being carefully concealed on board by the former master, Pedro Escoval, in a seroon of bark. The vessel cleared out from St. Jago about the latter end of May for Nuevitas, and two days after was captured by a French privateer, and carried back to St. Jago under suspicion of having a British license on board; the captors being unable to substantiate this fact, the vessel was liberated, and a certificate of the same granted to the master. After being detained for two months, the vessel again sailed actually for Nassau, and experiencing much calm weather put into Baracoa, and afterwards into Holguin, to obtain provisions, but without trading at either places. On her arrival in port she was, with her cargo, seized and condemned as a droit of admiralty, * by the judge [* 55] of the Vice-Admiralty Court of New Providence, who pronounced her not to have been protected by the terms of the license, the date of which, it appeared on minute examination, had been altered from March to May, with an allowance, however, of the claimant's expenses; from which sentence an appeal was now prosecuted on the part of the claimant.

The *King's Advocate*, for the right of his Majesty, contended, that the license having been granted for a limited period, which had expired previous to the vessel's departure from Cuba, the design of the voyage should have been altogether abandoned, or, at least, deferred until another had been procured of a later date, the vessel having ceased to be within the protection of the terms of the license. The reasons assigned in the case for condemnation, were,

1st. "Because the purchase of the vessel in the enemy's country, by British subjects, was illegal."

2d. "Because fraud appears to have been used in the alteration of the license, and it is not applicable to the transaction in question."

Jenner, for the claimant, admitted the date of the license had been altered, but totally without the knowledge, privity or consent of the present master; the license remaining concealed until his arrival in port, when it was given up to the foreign searcher who first discovered the alteration which had been made. The claimant's attestation satisfactorily proved these facts. The deviation to Baracoa and Holguin was within the intent of the license, which provided that * the vessel should not deviate from the regular course [* 56] between the ports mentioned therein, without sufficient cause

The Elizabeth. 2 Acton.

being assigned by the master for such a deviation. The failure of provisions on board this vessel was a sufficient and satisfactory reason alone for such a deviation. For the following reasons annexed to the claimant's case, he, therefore, submitted the vessel and cargo should be restored.

1st. "Because the said vessel had arrived in the harbor of New Providence, under the protection of a license granted by the governor of the Bahama islands, and delivered her cargo, and duly completed her voyage, previous to the seizure thereof."

2d. "Because the transaction in question was duly conducted according to the tenor and effect of the license granted in that behalf, and no fraud whatever is imputable to the parties engaged in it."

SENTENCE.

Pronounced for the appeal, reversed the sentence appealed from, pronounced the said ship and cargo to be protected by the terms of the license on board; and decree the same to be restored to the claimants, for the use of the owners and proprietors thereof.

[* 57]

* ELIZABETH, Soestadt, master.

May 16, 1811.

Decree of this court final. Not its practice to rescind its decrees.¹

Application to rescind upon a suggestion of the neutral character of a house asserting an interest in property formerly condemned for insufficiency in the proofs of property, rejected.

THIS was an application to rescind a decree, pronounced in March 1810, whereby their lordships condemned part of this cargo, claimed on behalf of certain Austrian merchants formerly residing at Trieste, to the crown.

Lushington, for the claimant, stated that the sentence of condemnation, formerly passed by the court, had been acquiesced in on an understanding, that on suggesting satisfactory proof of the national character of Messrs. Rioul & Smidt, the claimants of this property, who had been formerly merchants residing at Trieste, this decree

¹ [The Monarch, 1 W. Rob. 21.]

should be rescinded. This, he stated, had been acceded to by his Majesty's Advocate, counsel for the captors; and it was then settled, that an application to the court, under such circumstances, should meet with no opposition on the part of the captor. The proof he had to offer consisted of affidavits of the most satisfactory nature, and most conclusive, as well with respect to the facts attested, as to the unexceptionable nature of the testimony adduced to prove these facts.

The witnesses were persons of the highest rank and consideration under the Austrian government. It appeared, by the treaty of Vienna, a provision had been made in favor of such persons as should be disposed to retire from the ceded countries or cities, and an indulgence of some years had been granted to parties to remove from such places, and, amongst others, from Trieste, without prejudice to their national character. In the case of landholders, the time was extended

* to six years. In compliance with the terms of this treaty, [* 58] the claimants, Messrs. Rioull & Smidt, had prepared to remove their property from Trieste, upon its surrender to his Majesty's enemies, and actually had removed to Vienna. An affidavit, sworn and signed by Prince Starhemberg, stated, that Messrs. Rioull & Smidt had removed the wreck of their fortunes from Trieste, where formerly they had carried on an extensive trade, in order to found a new house of trade at Vienna, at which place they were now established. That they were persons worthy of credit, and had conducted themselves as loyal and faithful subjects of the hereditary states of Austria. Another affidavit, made by the late Austrian governor of Trieste, stated, that they were the principal accredited persons by the Austrian government at Vienna, in all commercial concerns where their house of trade was now established. This, he submitted, was, in itself, sufficient and satisfactory proof of the national character of these persons, although no affidavits were furnished by the parties themselves.

This application to rescind the decree of the court, in order to permit a party to establish its claim, was not without precedent; the case of *The Geheimirath, Shack Rathlow*,¹ was precisely in point.

¹ A case, in which the Court of Appeals¹ had pronounced a sentence of restitution upon the cargo. After a reference of account sales to the registrar and merchants to report thereon, it was represented to the court, that the further proofs upon which the court had ordered restitution, were impeached on account of the water mark, which, if it had been known, would have operated against the claimant, and led to the condemnation of the property; it was argued that this court would, upon principles of equity,

¹ Lords, 1798.

[* 59] * BY THE COURT.

SIR JOHN NICHOLL. As far as I recollect that case, it rather proved the rule that this court does not rescind its decrees. The motion to rescind, was made upon a reference to the registrar and merchants; but was refused, as it was said it was not the practice of this court to rescind its decrees, and open the matter anew, whatever other redress the parties might obtain by an application to the court, should it be proved they were materially aggrieved.

The *King's Advocate* denied he had ever been a party to any engagement, to which, had he acceded, he should now consider himself extremely deficient in his duty to his client. Any court would be particularly cautious how it rescinded its decrees, but particularly the Court of Appeal, whose judgment was final, and of such high authority. But, in the present instance, the proofs themselves were objectionable; nothing like proof had been offered to the court; no affidavits of the parties themselves were introduced, and it was possible, that although the claimants might be accredited persons with the Austrian government, at Vienna, they might yet have an establishment of some commercial kind, or even a house of trade at

[* 60] Trieste also. The property *also had been condemned above fourteen months ago; a period of time much too long for these merchants now to expect their application could possibly be attended with any success. Some bounds should be put, beyond which a court would not permit such application, even had it not, as in the present instance, pronounced upon the general principle that it was not its practice to rescind its decrees. Courts of law had settled, that after the expiration of two terms they would not consent to rescind their decrees.

Application refused.¹

and for the purposes of doing substantial justice between the parties, rescind the decree of restitution, in order to let in proof of fraud having been resorted to in preparing these further proofs. But the court refused, and said, their decree being final, it would be contrary to their practice to rescind their decree, and open the subject anew; nor where even it appeared a fraud had been practised, they could not go out of the order of their practice; the parties, however, might apply to the court in another shape, if they could satisfactorily prove they were aggrieved.

¹ It appears, from the registry of this court, that their lordships, in the case of *The Harmony, Paoli*, December 9, 1807, consented to rescind a former decree, and finally condemned the property; but of the special grounds upon which this application was made, the editor has been unable to obtain any satisfactory information.

The Manchester. 2 Acton.

THE MANCHESTER, Reynolds, master.

. May 27, 1811.

Breach of the blockade of Cadiz.

Condemnation of ship, and that part of the cargo laden by the directions of the master for owner's account, under the authority of a letter of instructions from the owner of the ship, which stated the vessel to have been "consigned to his (the master's) order."¹

Wine laden for account of another American merchant by an agent residing in Cadiz, who appeared to act in this instance under the authority of a general order to make such returns as he should consider eligible for goods transmitted to him from this American merchant, in their general course of trade, restored.

By a sentence of the High Court of Admiralty, this American ship, and part of a cargo of wine, had been condemned as lawful prize to the captor for a breach of the blockade of Cadiz; of the remainder of the cargo, part consisting of wine, was ordered to be restored to the American claimant, another part, consisting of salt, was ordered to be restored to the owner of the ship. From this decree, appeals had been prosecuted on the part of the captor, with respect to the goods restored; and on the part of the claimants, with respect to the ship, and that part of the cargo condemned.

* It appeared, by the preparatory examinations and docu- [* 61] ments found on board, that this vessel, with a cargo of flour and staves, sailed from Philadelphia, originally for the port of Lisbon; but that, on arriving off the coast of Portugal, she was warned, on the 23d December, 1807, not to enter any of the Portuguese ports, being then in a state of blockade, and therefore sailed for the port of Cadiz, where she arrived on the 28th December. By the letter of instructions, the owner, Mr. James, of Philadelphia, directed the master as follows: "Proceed with all possible despatch for Lisbon, placing the business in the hands of my friends, Gould, Brothers, & Co., then giving them directions to remit the net proceeds to Rathbone, Hughes, and Duncan, Liverpool; as the cargo is consigned to thy order, per invoice and bill of lading inclosed." The letter required him to expedite the discharge of the vessel, and proceed to Liverpool, advertising for freight. If goods should not offer, he was enjoined to fill the lower hold with salt. Should the port of Lisbon be blockaded, he was directed to make Cadiz, Ayamonte, or Algesiras; the letter concluded with stating: "I have no

¹ [The Adonis, 5 C. Rob. 256.]

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doubt but thy commission on the cargo will amount to as much as the primage would be to ~~Liverpool~~; if not, I shall make it up to thee." It also appeared the master, while at Cadiz, had learned from several American captains that the port was blockaded by the English; and, notwithstanding such information, took on board a quantity of salt, according to his instructions, and the remainder of a returned cargo on freight, partly consisting of wine, laden by R. W.

Meade, of Cadiz, for account and to the consignment of [* 62] * Mr. Ketland, of Philadelphia, and others; and partly of fruit, shipped by Mr. Cooke, an American, then at Cadiz for his own account. By a letter of advice from R. W. Meade to Mr. Ketland, it appeared the former had been for some time in the habit of disposing of consignments for Mr. Ketland, for which he had made him returns either in cash, bills, or, as in the present instance, by consignments of goods. With this cargo, so circumstanced, the master cleared out direct for Philadelphia, on the 15th of February, 1808, and on the 19th the vessel was captured.

Harrison and Lushington, for the captors, argued — That the port of Cadiz having been notified, by his Majesty's order in council of the 8th January, 1808, to be in a state of blockade, the knowledge thereof being actually brought home to the master, both the ship and cargo were liable to confiscation. With respect to that part of the cargo shipped by Mr. Cooke, there could not be a doubt entertained as to the propriety of the sentence of condemnation passed upon it in the court below; as Mr. Cooke, being in Cadiz himself, must have known the actual state of things, and, therefore, must have contemplated a breach of the blockade. The consignment to Mr. Ketland, it appeared, had been made to him without any particular order to that effect; and, consequently, should be visited with the penal consequences of the shipper's misconduct, in putting these wines on board with knowledge of the existing blockade. That part of the cargo consisting of salt having been laden by the master, who, by

the letter of instructions, appeared to be furnished with [* 63] complete authority and control * over the vessel and cargo.

it was argued must follow the fate of the vessel; although in the court below a favorable distinction had been made with respect to this shipment, and restitution decreed.

The *King's Advocate* and *Dallas*, for the claimants, contended — That the conduct of the owner of the vessel was perfectly free from any imputation of intention to break the blockade. He had ever provided against the probable existence of a blockade, with respect

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to both Lisbon and Cadiz, as appeared by the letter of instructions. The conduct of the master, however, might perhaps be impeached, were the fact of the blockade really brought home to him, which appeared extremely doubtful, as the vessel sailed the 15th February, and the order for the blockade did not issue until the 8th of January preceding. He had admitted he had heard a report of that nature, but denied ever having received any official communication of the blockade. But it appeared that the owner had not left the control of the vessel, or her cargo, with the master; the letter of instruction provided, that, whatever port he should enter, the business of ship and cargo should be placed in the hands of some of the owner's mercantile friends. At Lisbon, with Gould Brothers, & Co., or Dohrnan & Co., if the former should have retired from business there, in consequence of the irruption of the French into Portugal. At Cadiz, the concerns of the vessel were to be placed in the hands of Mr. Meade, and Mr. Robinette, supercargo of the American vessel there. If, finally, he were compelled to enter Ayamonte or Algesiras, he had directions to inquire of Mr. Meade in whose hands the business should be placed. He was, therefore, not the person responsible * for the conduct of the ship. The ship, and his part [* 64] of the cargo, therefore, could not be considered liable to condemnation upon the grounds alleged. The same uncertainty, with respect to the existence of a blockade, might appear to the court a sufficient apology for Mr. Cooke, in shipping the wines laden on his own account, and which had been condemned in the High Court of Admiralty. The goods consigned to Mr. Ketland appeared to have been merely returns for former consignments made by Mr. Ketland, for his own account, to Mr. Meade, who appeared clothed with the character of a very confidential agent for his employer; the time or mode of remittance being, in a good degree, left to his discretion and pleasure. There therefore existed no necessity for a particular order respecting these goods, the documents respecting which were characterized with peculiar fairness and integrity.

JUDGMENT.

SIR W. GRANT. Upon the evidence before us, this must be pronounced a clear case of breach of blockade inwards, under the order which issued respecting the importation of provision to this port. The vessel appears, also, to have broken a blockade formally notified by egress. On the order of the 11th November, 1807, the property would have been liable to condemnation. By the letter of instructions, the master's authority over the conduct of this vessel, and any cargo he might take in for account of the owner, is clearly recognized

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and established. He might, therefore, have prevented the shipment of the cargo of salt, which he appears to have put on board [* 65] with distinct knowledge * of the existence of the blockade.

The salt must, therefore, be condemned. With respect to the shipment made by Mr. Meade, the letters on board and bills of lading show that he had been long in the habit of making returns to and receiving consignments from Mr. Ketland, and had a sort of general order to act for him, with respect to this and other property, as he should consider most advantageous in the state of the markets. There is no necessity to produce a particular order for the shipment of these goods; which must, therefore, be restored. The judgment must stand exactly as it was in the court below in all cases, except in that part of it which refers to the shipment of salt, which is clearly subject to condemnation.

SENTENCE.

Affirmed the decree of the court below, so far as related to the condemnation of the ship, and the restitution of the wine shipped for account of Mr. Ketland; reversed that part of the sentence which restored the salt shipped for the account of the owner of the vessel, and condemned the same as lawful prize to the captor.

That part of the sentence of the court below, respecting the wines shipped by Mr. Cooke, was also affirmed, and the property condemned.

[* 66]

* VROW CORNELIA, Dykstra, master.

July 6, 1811.

Where a license had been granted for the importation of a cargo of brandy, from the port of Charente to Hull, upon a representation that the same had been purchased for account of several British merchants, and was then lying at Charente; the parties' agents in France finding it difficult, if not impossible, to export this cargo from Charente, caused part of the said brandy to be carried overland to Bordeaux, where it was shipped on board a Dutch ship, and a copy of the license indorsed for her protection, the original not being arrived, stating the port of shipment as at Charente. The remainder of the cargo was afterwards shipped in another vessel from Charente, bearing the original license, and arrived at Hull. The former shipment pronounced to have been protected by the license and the ship and cargo restored.

A CASE of a Dutch ship, chartered to import from Bordeaux to Hull, under license, a cargo of brandy, for account of several British merchants, principally residing in Yorkshire. In the prosecution of

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her voyage to Plymouth, for the purpose of obtaining convoy up the Channel, she was captured, and proceeded against in the High Court of Admiralty, for non-compliance with the terms of the license. The judge decreed the restoration of the ship, with freight and expenses, to be a charge on the cargo; and, on further proof, decreed the cargo also to be restored, on payment of the captor's expenses. An appeal was prosecuted by the captor, and an adhesion thereto on the part of the proprietors of the cargo, in respect to the captor's expenses.

Leach, for the claimants. It appears the present shipment had been one of several of a similar nature, in general originating with the house of Corlass & Co., of Hull, considerable importers of brandy. Messrs. Corlass & Co., previous to importing a cargo, usually applied to other merchants, to ascertain what proportion each house would take of the intended cargo; but being by far the most extensive dealers in the connection, their order generally doubled the quantity of those of the other houses together. Messrs. Corlass & Co. transmitted a copy of the orders so received to the house of Ranson, *Delamain; & Co., of Cognac, with [*67] orders to fill up, for their own account, as many hogsheads as would complete a cargo. For the amount of which Ranson & Co. had authority to draw on Sturemburg & Co., bankers, and correspondents of Corlass & Co., at Rotterdam. The purchase was completed. The Bremen ship Goede Verwagting was engaged to proceed with a license, obtained by Mr. John Hodgson of London, to Charente, to take on board the said brandy. In consequence of the various decrees of France, affecting neutral commerce, this vessel was considered ineligible, and the American ship Sally, chartered; which on arriving off the French coast was warned off by a British cruiser, in consequence of not having the license on board, which had been forwarded to Charente by Mr. Hodgson. By these delays the license expired, and another was obtained for the importation of these brandies, to continue in force for six months from the 2d January, 1809. Considerable difficulty arose in procuring a vessel at Charente for this purpose, arising from decrees and embargoes of the French government; and also on account of the neutral vessels in that port having been put under sequestration. Neither could any neutral vessel be induced to proceed from any of the neighboring French ports to Charente for this purpose, through apprehension of capture by British cruisers, or of being put under sequestration on their arrival. These circumstances induce Ranson & Co. to forward overland, at a very heavy expense, 300 puncheons (part of 589 which had been purchased to complete a cargo) from the port of Charente to

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Bordeaux, where the same was shipped on board The Vrow Cornelia. The original license not having then arrived, Ranson & Co. indorsed an *authentic copy thereof, received from Mr. Hodgson for the protection of this vessel from Bordeaux to Hull, and afterwards chartered the Dutch ship Johannes Van Letten to carry the remaining 289 hogsheads, which subsequently sailed with the original license on board, which was indorsed by them for her protection, and the following certificate written thereon: "The Vrow Cornelia, of Appengadam, J. T. Dykstra, master, put to sea on the 3d instant, with a copy of this license, the original not then being come to hand, loaded for Hull, with 300 puncheons of brandy, 4 hogsheads of red wine, 160 bales of cork-wood, and 42 cases of prunes; these two vessels have been sent, as no one vessel could be procured sufficiently large to carry the whole of the brandies purchased for the Yorkshire houses, and for the protection of which this license has been granted, signed Ranson, Delamain & Co. Charente, 18th June, 1809." This statement upon oath, by Mr. Corlass, is corroborated by that of Mr. Delamain and his confidential clerks, all averring the property to be in the before-mentioned British subjects, residing in the north of England. Other affidavits have been furnished to prove that the several deponents had ordered their respective proportions of brandy, making in the whole 274 puncheons, on their several accounts; and proving that Ranson & Co. drew upon each house for their respective shares, which drafts were duly honored when due. The proofs of property being so satisfactory, the claimants hope it will appear fit to the court to affirm the sentence of the court below generally, with costs; to pronounce for the adhesion, and reverse so much of the sentence appealed from as decreed the captor's expenses be paid.

[*69] **Reason for restitution* — Because the said ship and goods were protected by the license obtained; the parties being prevented from conforming more strictly to the terms of the license, by circumstances which they could not control.

COURT.

SIR JOHN NICHOL. At the time of granting this license would not this cargo have been within the protection of the order of 26th November, 1807? Does it appear that order was then revoked?

Arnold. It does not appear it was revoked.

Swaby contended the rule of the court had been to construe licenses largely and beneficially, for the interest of the parties acting under

them especially when no deceit had been practised; and that the present claimants were, therefore, peculiarly entitled to the most beneficial and indulgent construction under the peculiar circumstances of this case.

The King's Advocate, for the captors and appellants. The present case was formerly argued merely as a case of a vessel sailing with a copy of a license on board, designating the port of shipment differently from the port whence she actually sailed. This is not now the only point which it will be necessary for the court to determine. The evidence in the cause furnishes other grounds of impeachment. It must be always a material consideration with government, in granting licenses, that the place pointed out in the license for shipment should be strictly adhered to. There may be obvious reasons for permitting a shipment at one *port at ever so small [*70] a distance from another prohibited port of the enemy. Cases have occurred, where vessels having licenses to proceed to ports this side of Morlaix, have been punished for transgressing the permission, and going beyond that port. Such was the case of the ship *Hercules*,¹ limited to ports on this side Morlaix or Cherbourg, which was condemned for going beyond these ports. If the parties cannot do the specific thing which is prescribed by the terms of that instrument, which can alone render such a communication with the enemy's country legal, they are not at liberty to do the very next thing to it, but should apply to government to enlarge the permission. The operations of our marine at the mouth of the river of Charente at that time might be intended to do away all such grants of licenses to that port; and, indeed, it is natural to suppose, it would be under these circumstances an object with his Majesty's government to prevent any vessels or merchandises from coming out of this port.

Another material part of this case is the necessity there exists that the claimants should afford the most satisfactory proof of the identity of these goods, asserted to have been purchased for their account so long prior to their being shipped on board this vessel. The invoices now offered as proof are not sufficiently explicit as to the property, nor is it established by the papers in the cause, whether these brandies were actually conveyed from Charente, or procured from the neighboring vineyards, for the permission of the license goes no farther than to authorize the importation of certain brandies there purchased for these Yorkshire houses, and lying at Charente. The transaction

¹ Lords.

commenced in 1808, and concludes in 1810 by the ship
 [*71] ment. * Where these goods have lain ever since, or at
 whose charge, is not explained. If they were actually purchased by or on account of British merchants, the French merchant should be shown to have received his money with charges and interest to the actual day of payment or shipment. The proofs of property, therefore, are insufficient.

This shipment cannot be considered within the terms and certainly not within the policy which must govern licenses in general. By a question from one of your lordships it seemed to be inquired whether the whole object of this license was not to obtain a permission to use an enemy's ship, as vessels of a neutral state would by his Majesty's instructions of November 26th, 1807, be protected in such an importation into ports of Great Britain. However general the permission of the license as to the sort of bottom in which these goods might be imported, such vessel was nevertheless bound to conform to the terms of the license as well as the importer himself, and the master should carefully examine, at his peril, whether the intended shipment was within the protection of the license procured before he entered into any charter-party or agreement. Here a mere copy was put on board, which, it is contended, was sufficient to protect this vessel. Such never was the intention of government, for it would open a wide field for fraud, and as in the present case the copy might serve to deceive one of our cruisers, while the original defeated the vigilance of another. But their argument must necessarily go farther, and infer that neither the copy or original license need be on board; and still upon its being objected that a departure had taken place from the terms of the license granted, it might be
 [*72] argued upon these *principles, that the master was perfectly innocent, having acted on the faith and conviction that such a license as would protect his ship and the cargo on board had been procured from the executive, and was then in existence, as he had been informed by the importer. A copy never could be intended to authorize a second or double shipment, nor can it be supposed to have any efficacy except as a representative of the original. If, therefore, no such extensive permission had been intended by the original, the mere copy could not create it. And in this case it appears there has been an application of a license to a shipment not within its contemplation, either as to the quantity of goods imported or the port of shipment. At first it was not avowed, the original had been applied to another purpose, that of protecting a separate shipment, and the question was considered as one merely of variance as to the port of shipment prescribed by the terms of the license. The

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further proof disclosed the important fact of another shipment being made under protection of the original itself; the parties have, therefore, little to boast as to the candor and good faith of the transaction. This now becomes a striking feature of the case, and will have its proportionate influence on the decision of the court. In courts of common law, as well as courts of prize, licenses have been ever considered instruments *strictissimi juris*, and in those of common law, privileges have been denied a claimant in the interpretation of expired licenses, which have been granted them here. The case of *The Cosmopolite*,¹ where the question as to the propriety of an extension of time, was brought before the court below, the learned judge, in laying down principles for this interpretation, states, that "two circumstances are required to give the due effect to a license; first, that the intention *of the grantors shall be pursued; and, [* 73] secondly, that there shall be an entire *bona fides* on the part of the user." After what has fallen from that learned judge, in deciding on that case, courts of prize should hear no more of a general equity founded on the particular inconveniences and distresses to which merchants are subjected in the present order of things. The claimants' case in fact amounts to a request, that the court will determine and interpret licenses, not by what actually emanates from the royal will in one of the highest exercises of the prerogative, but by something resulting from its opinion upon the difficulties of the mercantile world; or, in other words, that you are to raise up for their accommodation, a license out of circumstances, a request which has been here and elsewhere uniformly refused. It remains, then, to be determined, what bounds are to be assigned to the extension of this constructive protection here contended for. Admit their plea in one case, and it will be impossible to prescribe limits to the indulgence in future. The terms of the license should be conclusive of the question; and the license is for a ship as well as a cargo. If a license of this kind were found inadequate to the purposes of the party, a case should have been submitted to the board of trade, who might have extended the indulgence, although, as it has been an object with France to increase the importation of brandy, it might have been, also, one with our government to restrict it as much as possible. In the case of *The Twee Gebroeders, Jans*,² the protection of a license to import a cargo of salt from Bordeaux, was considered to be forfeited, where it appeared the port of shipment had been changed to St. Martins, although it was said, that specific licenses had

¹ 4 Admiralty Reports, 8.

² 1 Edwards Reports, 95.

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[* 74] *been obtained, at the time, for shipments from the port of St. Martins, and that, therefore, the deviation was not contrary to the policy of government, at the time. And, certainly, it is beyond the powers usually exercised by these courts, to consider the quantity immaterial, and then let in two or three ships with their cargoes, when, evidently, the license itself, and the representation of the parties upon which it was obtained, point out a single shipment: thus altering the proportion of a prescribed commodity to an indefinite extent.

BY THE COURT.

SIR WILLIAM GRANT. Supposing that, as you have argued, two vessels cannot import each a cargo, according to the tenor of this license; can it not be contended that the other vessel is that left destitute of protection, and the present vessel having sailed first, although only with a copy of the license on board, is protected thereby, and thus the license exhausted?

The fact must be taken from what is disclosed in evidence; it is disclosed to be the intent of the parties, that two vessels should be employed. This is altogether a departure from the original license, and their former representations to the council board. It might as well be contended, that if these parties had any other vessel about the same time coming with a similar cargo for importation, this license, if put on board her, would effectually protect such shipment.

COURT.

SIR WILLIAM GRANT. Had you captured the second vessel on her passage, you would have argued very *strongly. [* 75] that these merchants had, by this prior shipment, declared their election; and that the first was protected, the second not; especially as there appears to have been an indorsement on the copy, declaring the intention of the shippers to act, in that instance, under the protection of the original, which had not then come to hand.

It is also very probable that French interests may be in this cargo, and although British interests should suffer, the public service should be preferred to the private interest of parties, at least, guilty of most culpable negligence; at least, more satisfactory proof should be required, which is another part of the captor's case. It is said, these brandies have been paid for by Dutch bills, yet, the court is provided with none of the particulars of these asserted transactions, between these Dutch and English houses, or with any corroborative documents.

COURT.

SIR JOHN NICHOLL. Such curiosity is, I believe, seldom gratified. The *minutiae* of transactions of this nature, would be too delicate a subject to expose, and might involve many in difficulty or danger. In the court below, no correspondencies of this necessarily secret nature are ever required.

The court, however, will require these parties to show that the whole now actually imported under color of this license, was that quantity intended to be covered when the application was first made for a license. Further proof will also be required on other parts of the transaction. The vagueness of Mr. Corlass's order rendered it uncertain to what extent insurances should be [* 76] effected by his agent, Mr. Hodgson. Nor could it be more satisfactorily determined what proportion of brandy was carried for each house in this ship, or the one since arrived. The whole does not appear like a mercantile arrangement, and is peculiarly liable to suspicion.

13th June. *Dallas*, same side. The first consideration for the court in this case is, whether there was a complete adoption of this cargo by the parties applying for the license, and in determining this, it will be quite immaterial whether Messrs. Corlass & Co., and the other houses, have since paid for the whole or not, if they did not make this purchase prior to obtaining the license; in which case there could be no such adoption as would protect this cargo as the property specified in the license. And here it is observable, the different claimants, although they profess these goods have been paid for by bills on a house in Holland, give no specific dates to these bills, which renders it impossible the court can have at present any satisfaction on this part of the case. Nor are the proofs brought in less objectionable as to their authenticity. The attestation of Mr. Delamain is liable to strong suspicion. No account is given how it originally came into this country. It is well known to the court there are, in this country, persons whose profession and daily occupation is the fabrication of French papers with the seals of official departments, to assist in the introduction of British merchandises into France, and the countries under its influence. This attestation, made by a Frenchman, in France, before a French magistrate, is, nevertheless, made in the English language, and certified by the magistrate in English. The same doubts may fairly be entertained of Mr. Delamain's confidential clerk's affidavit, which is also in the English [* 77] language. The French excise law has also prescribed, with

much precision, the make of the paper and the stamp to be impressed upon such documents. A strange departure has taken place, in the present instance, from the established custom. This paper is not of the French make, which bears, usually, in the water-mark, the impression of an eagle, and the motto, *L'Empire Français*, but is of Dutch make, and has a Dutch word in the water-mark. These circumstances, combined with others already pointed out, will induce the court to consider the transaction fraudulent; first, in the fabrication of these documents, and, secondly, in applying the copy of a license for a specific cargo, so as to cover a larger quantity than was originally intended to be imported under it.

The license itself was clearly but for one ship. Two vessels, therefore, can, by no latitude of interpretation, be protected by a license granted but for one. In the case of *The Hendrick*,¹ it was held, that the parties were entitled to a favorable construction of the license, on the ground of special confidence, the permission being for three ships bearing any flag from Bordeaux, or any other French port. Here the permission is restricted to one port. The cases, therefore, are perfectly dissimilar. Nor is there an instance on record where a party has been permitted to extend the protection of a particular license beyond the express terms of it.

The grant, also, must be considered, as to the party himself, for his own benefit, and expressly for the purpose of doing that which he has, in the first instance, undertaken to do. The law upon this subject was particularly strict, but owing to the inconveniences felt by the commercial world, a greater latitude has been given to

[* 78] *the interpretation put upon these instruments. All the cases on this subject seem to establish, that the persons to whom the grant is made, the quantity and quality of the articles, the time, and, above all, the place, are material parts of a license. The last, for this express reason, that the executive government may have weighty reasons to prevent the exportation from one particular port, while they permitted it from every other in its neighborhood. The judgment of the High Court of Admiralty, which, in effect, pronounces the importation from Bordeaux to be a compliance with the permission and terms of the license, should be reversed. There existed no stringent necessity to go immediately to take in their cargo at Bordeaux. Their agent might have acquainted the parties, and waited until an alteration had been made by government in the port of shipment.

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The cases of *Shiffner v. Gordon & Murphy*,¹ and *Gordon v. Vaughan*,² are decisive authorities upon this part of the case; the latter of which the Court of King's Bench determined against the assured, upon the ground of their non-compliance with the terms of the license, by which alone the adventure, it was said, could be legalized.

It is not within the sphere of a judge's duty to substitute himself for the executive government; he should pronounce according to the facts in evidence, and the terms of the instrument under which the party claims exemption from the ordinary operations of law. This reasoning is exemplified by the conduct of the French government, which, in this instance, appears to have distinguished between their ports, and would not permit a vessel to clear out from Charente, although from Bordeaux it was not prohibited. The doctrine is also sanctioned by many decisions in this court, and that from whence this appeal has been prosecuted. In *The Twee Gebroeders*,³

**The Cosmopolite*,⁴ and *The Jonge Klassina*,⁵ in which last [* 79] case the learned judge, in pronouncing sentence of condemnation, declared, "the province of the court could go no further than to pronounce whether this transaction came fairly and adequately within the terms of the license, under which alone it could be supported." *The Hercules*,⁶ a case of a Prussian ship with a license to the port of Morlaix, taken going into Cherbourg, notwithstanding the vicinity of these ports, the court held that they could not extend the terms of the license; and *The Europa*,⁷ where it is also held, that under such circumstances, application ought to be made to the council office to obtain its sanction.

That the license has been violated in matter of substance, appears, first, from the copy being indorsed as the mere substitute or representation of the original, while the original is applied to another shipment; secondly, from her papers, two sets of which she had on board, one simulated, as usual, but both the bills of lading holding out the port of Charente as that of shipment, from which she did not sail, with a view to deceive our cruisers, lest they should perceive the variance between the port of shipment and that prescribed by the license, while the simulated papers, describing the vessel's destination as for Bergen, state the port of shipment fairly; and, thirdly, from the want of an indorsement on the license of the time of this vessel's clearance from Charente, as was required by the said license. The indorsement on the license, also, states the voyage to be from

¹ 13 East. 296.

² 13 East. 302.

³ Edward's Adm. Rep. 95.

⁴ 4 Adm. Rep. 8. ⁵ 5 Adm. Rep. 297. ⁶ Lords, 1805. ⁷ Lords, May 15, 1810.

Charente to Hull, whereas it was from Bordeaux. It is made by Ranson & Co., as at Charente, and dated 31st May; while the declaration of the quantities of the cargo is signed by Ranson & Co. on the same day as at Bordeaux. Thus these two documents, stating the same parties to be in two places at one and the same time, display a fraudulent conduct on the part of the shippers which shows these parties all acted in concert, and were aware of the material departure made from the terms of the license. But the fraud is carried further. The various bills of lading state the vessel to be taking in her cargo "now, at Charente." The whole object of the fraud was to make the port tally with the license; and it never appeared, until the examinations in preparatory, that the vessel actually sailed from Bordeaux.

COURT. It is in evidence that both sets of papers were given up.

Yes, but your lordships will perceive it was then too late. The master had before stated, on his examination, that all the papers had been delivered up, but subsequently introduced the false papers, which described her destination as to Bergen, and the port of Bordeaux as that of shipment; adding, that they had been in his wife's possession, and he did not know they were on board. No credit can be given to such an assertion; and the fraud here attempted to be practised by the master must be attended with the usual penalty of confiscation of the ship. The court has suggested that, as this copy of the license, so indorsed, had been put on board, it might be contended the party had made an election of this vessel, as that intended to be protected by the original. To which it may be answered, the transaction throughout is so replete with fraud, that parties engaged therein cannot be permitted to derive any benefit from this indorsement or supposed election. Both vessels [* 81] were clearly navigating the sea at once, and under the constructive protection of this one instrument. The indorsement on the copy, then, vitiated the license itself, which was on board The Sally; and the absence of the license, coupled with the fact of its being employed in protecting another cargo, rendered ineffectual the copy so indorsed on board this ship; for certainly the practice of the court would go no farther than to restore that ship and cargo, on board which the original itself was found, provided the claimant made out a fair case; for, under these circumstances, fraud would, of course, operate against restitution of either. The whole case is one of the most suspicious character and circumstances; and it is remarkable that the deposition of Mr. Hodgson.

although the constituted agent of these parties, has not appeared among the proceedings in the cause. His intimate knowledge of the whole transaction rendered it extremely desirable to these claimants he should be examined if their case were a fair one. Among the farther proofs is a minute of the examination of Mr. Hodgson and Mr. Nodin, as to the truth of the facts stated in the petition for a license, taken at the office of Lord Bathurst,¹ which by no means affords any *satisfactory account of those facts most [*82] suspicious in the case, and states the whole quantity ordered to have been only 262 puncheons. To supply this deficiency, Mr. Junon, ship-broker, of London, has made an affidavit in verification of the property, who can only speak as to his belief, and as he heard from others, being altogether unacquainted with the transaction. It is farther to be observed, that the claim made for five puncheons, as the property of Housman & Co., has not been verified; which, it is submitted, with five others unaccounted for, in the whole number of 589, pretended to be ordered and purchased, are a fit subject for condemnation upon this ground alone.

Reasons for condemnation: 1st. Because the ship, being an enemy's ship, and the cargo a shipment between the enemy and this country, can only be protected by a license *duly [*83] acted upon. Whereas the present license did not originally authorize a shipment from Bordeaux, and was, moreover, spent, having been applied to another ship.

¹ Minute taken before Mr. Reeves and Mr. Chalmers, at Lord Bathurst's office, December 30th, 1808:

"Upon examination of the memorialist (Mr. Hodgson) and Mr. Nodin, and upon a view of sundry papers produced by them, relating to the several parts of the memorial, it appears — That the memorialist ordered brandies of Ransom, Delamain & Co., of Charente, on the 5th March last, and at other times, till the final order on the 17th May; the whole quantity was 262 puncheons; the brandies were for himself, and for other persons at Rotheram, Leeds, Hull, and other places in Yorkshire; he fixed credit to pay for these articles at Rotterdam. By letters from Ransom & Co., of 6th June, they advised that they had made the purchase. The obstruction to bring home those brandies has arisen in this way: The Goede Verwagting, a Bremen ship, was chartered for bringing them, but this being a ship liable to the embargo in France, another was chartered in England, an American, The Sally, Captain Nathaniel Willis. The Sally proceeded in ballast, about the 25th of October, (the charter-party exhibited is of the 17th of October,) but she was warned off the coast of France by his Majesty's ship Alcmena, Captain Tremlett, 14th November, 1808. It seems the memorialist had sent the license, dated 31st May, to his correspondents, Messrs. Ransom & Delamain, for covering the ship and cargo; a copy of it he gave to the captain of The Sally. The captain of The Sally produced this copy to Captain Tremlett, who deemed it insufficient, being only a copy, and, therefore, warned The Sally back. This is certified by Captain Tremlett's indorsement on the license."

2d. Because the original evidence did not justify an order for further proof; and the further proofs exhibited in this instance consist only of the attestations of the interested parties, unsupported by documentary evidence avowedly in their possession, to the production of which the captor was by law and practice entitled.

Leach, in reply. As to the first point, that this license was granted for a specific cargo, contended that the cargo ordered amounted to 589 puncheons, as appeared from Corlass & Co., Delamain & Co. and their clerks' affidavits. The minute of the petition and representation for a license introduced was altogether incorrect, in stating the whole intended cargo as amounting to 262 puncheons; and this appeared fully from several depositions, which stated that Messrs. Corlass & Co. constantly doubled the orders received. Nor would it have been an object with them to hazard so very valuable a cargo, because had this license been considered insufficient to cover all, another might have easily been procured. As to the second point, that the license was granted for one ship only, the license was actually granted for a cargo which was then stated to have been purchased and lying at Charente, and which cargo was afterward divided between these two ships. In the case of *The Johan Peter*,¹

the license was dated in 1808, and the capture in 1810, full [* 84] eighteen months after; and as *it appeared the claimant had contributed all in his power to effect the return of this cargo within the appointed time, their lordships considered the departure as to time immaterial. Applying this rule to the present case, restitution would follow. The many requisites enumerated to give effect to a license, were merely for the prevention of fraud: where a substantial intention was discovered to act uprightly, the court could and would, no doubt, relax the strict letter of the law in favor of such claimants. If the question had merely been, which of these cargoes was protected by a license for a specific cargo, then lying at Charente, had any fraud been discovered in this case, their lordships would probably have pronounced that neither were protected; but here the question was, whether with a complete *bona fides* throughout the transaction, the copy of a license, thus indorsed, would protect the cargo embarked on the faith of the original, in the absence of that original. It would, also, be immaterial whether both these vessels were at sea together; whether the last sailed one day before or after the former's arrival in England. As to the third

¹ Lords, July 7, 1810.

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point, that the grant was confined to a shipment from the port of Charente alone, the same answer might be given. Was there a complete *bona fides* in this respect displayed? From Charente it was impossible to export this cargo; the identical cargo, however, was brought overland to Bordeaux, and there shipped, which was a substantial performance of the engagement to export a cargo from Charente. What injury had thereby arisen to the rights of British cruisers? The port from whence she sailed was described * from Bordeaux in the simulated bills and French passport, [* 85] which were delivered up. The indorsement, as from Charente, merely followed the words of the license itself, which, however absurd, could not be considered criminal. The examination of Mr. Hodgson was now rendered material only to repel the presumptions of the captor, and there could be nothing suspicious inferred from the claimants' not having afforded more proof than was necessary to support his case. Hence the court below had been of opinion that the positive testimony in the cause should not be rebutted by inference of this nature, and decreed restitution.

SENTENCE.

Pronounced against the appeal, affirmed the sentence of the court below, decreeing restitution of the ship and that part of the cargo consisting of brandy, and remitted the principal cause.

*SANTO THOMAS, Castello, master.

[* 86]

June 13, 1811.

Application for a deduction of freight, pronounced to be due to the captor, alleging that damage had arisen in consequence of improper stowage of articles, restored by the sentence of the court below. Application refused, it appearing to the court that no objection had been made at the time of delivery. Application for further proof, as to the exact time of making the objection, refused, in consequence of culpable neglect and delay.

In this case an appeal had been prosecuted from the sentence of the High Court of Admiralty, pronouncing freight to be due to the captors upon a cargo of tallow and hides, carried on board this Spanish vessel from Monte Video to London, upon the ground that these hides appeared to have been damaged to a considerable amount by improper stowage.

Dallas and *Arnold*, for the claimant, stating the reason in the case for the appellant — "That the captor was entitled to no more freight than would have been due to the master for his owner, and in this case none remained due; part having been paid before, and damage to an amount exceeding the remainder being occasioned by improper stowage, for which the master was responsible;" argued that the captor, therefore, succeeding only to the right of the master or owners, should in the same manner derive only the advantages from the contract respecting freight which those parties would have been entitled to had not the capture taken place, and the condemnation vested their rights in the captor. By the affidavits of Mr. M'Taggart, an eminent broker, and others, it was proved the hides had been materially damaged by placing the tallow upon them, (con-
 [* 87] trary to * custom,) which were thereby rendered putrid and were deteriorated in value, insomuch that upwards of 2,000 were sold at 7s. 6d. each, whereas the sound sold for 19s. 6d.; the total loss thereon amounting to 1,300l. And upon a representation of the condition of this cargo to the commissioners of excise, the claimants actually received a return of three fourths of the duty upon 1,972 hides, and one third upon 362. The fact of damage by improper stowage then being established, the claimants had a lien upon the freight still due, (part having already been paid at Buenos Ayres,) more especially as it had been stipulated in the charter-party: "That the freighter should merely cause the hides to be brought alongside the vessel, from whence the master and his crew should receive and stow the same at his own cost." Of the freight there now remained due only 962l. 10s., which, deducted from the damage, amounting to 1,300l., the claimant, if the court should pronounce for the appeal, would still be a loser of more than 330l. This was, therefore, a case in which the sentence of the court below, founded on the registrar's report, had imposed a great hardship upon the freighters. At common law, the damage would have entitled them to recover against the master or his owner. In the few cases reported upon this subject in our courts, with respect to the general undertaking of a master, by the bill of lading, to deliver the goods committed to his care in the same good order and condition as they were received, a distinction had prevailed, founded upon the manner in which the goods had been put on board, whether
 [* 88] in open and visible or in * closed packages; in which latter case the master was entitled to more favorable consideration. Here, however, from the nature of the article, (each being put on board separately, and capable of examination,) it must, of course, be taken strongly against the master, and the whole be considered to be such as the bill of lading had described them.

King's Advocate, for the captor, contended — That, under the circumstances of the case, it would be unfair to deduct any part of the amount of the alleged damages from the captor's demand on account of freight. It could not be contended that here the allegation of damage in the hides was *prima facie* against the captor, and should throw on him the burden of proving they were in good condition; because here there had been no immediate objection on the part of the freighter. The capture had taken place in January, 1805; the cargo was restored in March; no objection was then made to its condition. An account of freight was delivered by the captors in June, still no objection was stated. On a reference to the registrar and merchants, there appeared to be, for the first time, a claim made for damage, which they stated they did not consider within the reference to them, not perceiving (as it was stated) that the court had pronounced any judgment on these claims, and, therefore, made no report upon the subject. In March, 1809, the King's Proctor prayed the judge to confirm the registrar's report, when the claimant's proctor objected thereto, and prayed to be heard on petition; and the affidavit of Mr. M'Taggart and another was introduced to prove the damage, which also stated his opinion respecting its cause. The report was, thereupon, referred [* 89] back to the registrar, to report if any deduction should be made from the freight formerly pronounced to be due; who reported that there appeared no ground for altering the report. The judge confirmed this report, and the party thought proper now to appeal. This delay and negligence therefore must, he contended, be fatal to the claim, had it been ever so clearly established; especially as the court must see the captors never were any party to this agreement or charter-party upon which it is contended the ship's owner would have been liable. The objection should have been on delivery, for the party was not at law allowed to receive the goods and afterwards refuse to pay the freight.

Dallas suggested the certificate of the custom-house officers, stating the reduction that had taken place in the duties on these hides, and that they were thus injured in consequence of improper stowage, was dated in June, 1805. It was, therefore, to be inferred the objection must have been taken before this, and shortly after the capture.

King's Advocate stated it would be material to ascertain the practice of shippers in South America, before it could be possibly determined whether this mode of stowing were unusual. The affi-

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davit of the broker did not affect to state the custom. If it were improper, however, the shipper might still resort to his
[* 90] action * at common law, and recover part of the money already paid in advance.

The court stated it was still uninformed when the objection was first made. The delay was extraordinary, and could not but present itself as a very material objection to the demand.

Dallas requested the party might be permitted to show when this objection first was taken. The claimant was in possession of documents, which, he was instructed, spoke as to that circumstance.

BY THE COURT.

SIR JOHN NICHOLL stated this sort of evidence might have been rebutted by the Spanish master's testimony, whose evidence, by the unaccountable negligence of the claimant, it was now impossible to procure, having long since, in all probability, left this country.

Dallas argued that the determination of the registrar and merchants had proceeded upon a wrong ground, namely, that the claimant was bound to show their good condition when shipped. The question now was argued upon quite a different ground; the sentence confirming that report of the registrar should not be affirmed.

King's Advocate replied — That the admission of such evidence now would directly operate against those who could not possibly be in a condition to answer it.

[* 91] The court considered the evidence of the Spanish master, under such circumstances, would be material, and affirmed the decree of the court below.

SENTENCE.

Pronounced against the appeal, and affirmed the sentence of the court below.

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The Santissima Coracao de Maria. 2 Acton.

SANTISSIMA CORACAO DE MARIA, Carneiro, master.

June 20, 1811.

Colonial trade. Portuguese subjects trading with the enemy's colonies, cannot avail themselves of the treaty of 1754, subsisting between this country and Portugal, as excepting them from the general restrictions imposed on neutrals trading with those colonies.

Contraband outwards on board a Portuguese vessel trading with the enemy's colonies, enures to her condemnation on the return voyage.

The law of contraband, the same with respect to Portugal as other neutrals, notwithstanding the above treaty.

THIS Portuguese vessel sailed from Oporto, in 1806, with a professed destination for Vera Cruz, where she delivered her cargo, consisting of iron in bars, tar, pitch, fish, bunting for colors, gin, &c., and took in return cochineal, indigo, cocoa, bark, &c., with which she sailed for Oporto, but having deviated into the Havana, from distress, (as asserted,) was captured and carried to New Providence, where proceedings were instituted. A claim for the ship and cargo, as Portuguese property, was admitted; but the court directed further proof, to show wherefore the outward cargo was divided into two bills of lading; whether both were shown to the British consul at Oporto, and this certificate obtained upon a full knowledge of their several contents; whether both bills, with the invoice and clearance, were again produced to the searching officers of the king's ships which visited this vessel on her outward voyage; and whether they were apprised of the facts of pitch and tar constituting great part of the cargo; also, whether the pitch and tar were native productions of Portugal, and *why the outward cargo was sold at [* 92] Vera Cruz without the intervention of a Spanish agent, or the charge of any duties. The judge directed this further proof to be exhibited by plea and proof within twelve months. Various papers were invoked by the captors. After the expiration of eighteen months, the judge pronounced the claimant's proofs insufficient, and condemned the ship and cargo.

The reasons, in this case, for condemnation, were, Because the ship had supplied the enemy with articles contraband of war, on her outward voyage, in violation of the order of the 24th June, 1803; and the cargo is the proceeds of that shipment, claimed for the person who was the charterer of the vessel on that voyage, and principally concerned in the management of that illegal transaction.

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Those for restitution were, Because the ship, having a Portuguese flag and pass, and a Portuguese crew, was protected, together with her cargo, by the Portuguese treaty.

2d. Because no further proof was necessary; and the manner in which it was ordered and acted on was productive of extreme vexation and injustice to the claimants.

3d. Because the effect of the further proof produced by the captors, did not impeach the regular evidence in the cause.

King's Advocate and *Burnaby*, for the captor. This vessel appears to be liable to condemnation, as well upon the ground of illegality in the voyage, as of defect in the proof of property. With [* 93] respect to the property, * it is remarkable, the master claims for the ship as the property of Mr. De Silva and others, and for the cargo as that of Mr. De Silva alone, to whom the vessel was chartered. He appears to have been the agent for ship and cargo, and the proceeds of the outward cargo were directed to be invested by him in a return cargo. His conduct, therefore, clearly must bind the owner or owners of the cargo. Several persons appear to have property on board this vessel on her return voyage, which fact is suppressed by the master in the preparatory examinations. In the invoked papers are letters distinctly stating, that a priest, who had embarked in this vessel at Vera Cruz, for Spain, would, by this capture, lose about seven thousand dollars, the value of ten seroons of cochineal, shipped on board nominally for the account of others, but actually on his own; that the Spanish clergy would suffer considerably, amounting to 200,000 dollars in specie, and also several merchants of Vera Cruz, who had made large shipments for Spain by this vessel. Another invoked letter, from a shipper at Mexico to a house at Cadiz, advises them of having shipped cochineal for their account on board her. This, and other passages, distinctly point out an actual destination for Spain, and also impeach the evidence of property, a considerable portion of which appears to be that of the enemy. On this ground, the cargo having been falsely described, in order to protect these goods by a neutral character, the court cannot admit further proof to enable the parties now to distinguish the one from the other.

Upon that part of the case, relating to the deviation into the Havana upon her return voyage, it is obvious, from the disclosure of facts which has taken place, that the master had it in con-

[* 94] templation previous * to his departure from Vera Cruz.

This priest actually embarked at Vera Cruz for the Havana, as appears by the letters found on board, recommending him to dif-

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ferent persons residing there. The pretext for entering this port, is merely that the meat on board being rotten, and the water expended, the crew, therefore, compelled the master to make this port. When the distance of this port from Vera Cruz is compared with the length of the entire voyage to Portugal, it cannot be supposed possible, the provisions intended to last for the latter, should be altogether consumed or rendered unfit for use in so small a part of it. The real purport of this deviation may be discovered by considering what has become of the 200,000 dollars said to have been shipped by the clergy. They are not found on board at the capture, therefore must have been left, at least, in part, at the Havana. In his examination, the master makes no mention of any specie being on board, except 5,400 dollars, which, although described as his own property, and that of some relations, the returns of some private adventures, may, with tolerable certainty, be considered the remainder of those shipped for account of the clergy, as he could not, without great danger, attempt to bring back specie in return, the law of Spain having rendered it illegal under these circumstances.

The invoked letters go very far to induce a suspicion this vessel was returning to Cadiz, and not to Lisbon, as also the consignments which appear to have been made direct to persons at Cadiz. Upon the ancient principles by which the commerce between the colonies and mother country have been regulated, this property must be liable to confiscation. The Portuguese treaty, it is said, protects *the property of the different shippers. Whatever may be [* 95] the effect of that treaty as to the trade between the mother countries of Spain and Portugal, upon the general principles laid down by one of the best authorities, Montesquieu,¹ it cannot be strained to extend to the colonies of Spain. This species of commerce is merely one of a privileged nature; and it must not be inferred, because a particular nation has obtained a permission or privilege beyond others, that permission is to extend to an illegal interference in the trade between the colonies of the enemy, or those colonies and the mother country herself. It has been decided, the Portuguese treaty is not to be construed to cover or protect any cases of fraud;

¹ Montesquieu, speaking on this subject, says: "It has been established that the metropolis or mother country alone, shall trade with the colonies, and that from very good reason." "Thus it is still a fundamental law of Europe, that all commerce with a foreign colony shall be regarded as a mere monopoly, punishable by the laws of the country." "It is likewise acknowledged, that a commerce established between the mother countries, does not include a permission to trade in the colonies; for these always continue in a state of prohibition." Spirit of Laws, book xxi. c. 21.

which may also be collected from the terms of the declaration of 1780. In the case of *The Nova Aurora*,¹ which was a ship and cargo claimed for a party under the Portuguese treaty, although the court held the property might be restored, yet it was upon different grounds, and it then took an opportunity of observing, that many were incurring considerable hazard by running a similar course with the present, unless it could be inferred the intention of the treaty was to throw open the trade altogether. The court restored the property; an appeal was afterwards entered; which, however, was abandoned; and, in the court below, wine, to a port of military equipment, [* 96] has been considered contraband, as in the case of *The Asia*. These instances will serve to prove that the Portuguese nation has hitherto been included within the general restrictions imposed on the commerce of neutral nations under such circumstances. To obtain restitution, the claimant must show an exemption from the law of nations very different from that which it is presumed he derives from the treaty, the treaty being only intended to preserve to Portugal a peace-right, and altogether inapplicable to any permission to violate the known colonial regulations. Several claims of this description were made in 1749, for French owners, before France was engaged in the war, upon the French treaty, and also in 1756, for Dutch owners, upon the Dutch treaty; but the courts have recognized no such privilege to interfere in the close trade of the enemy.

In support of the captor's allegation, a witness, named Montenegro, has been examined, whose testimony the claimant has in vain attempted to impeach. His deposition states, he has long known the vessel; first saw her at Vigo; that she is the property of a merchant near Vigo, and Don Pedro Echeverria, of Vera Cruz, as he has had opportunity to ascertain by inspecting the books of the latter, being employed in his counting-house; that the present voyage was to have concluded at Vigo, for which port it was openly advertised, at Vera Cruz, she was taking in a cargo; the outward cargo was delivered to the said Echeverria, and by him disposed of; the return cargo belonged in part to him, and partly to De Silva and others; that 200,000 dollars in specie were put on board this ship at Vera Cruz, the greater part of which not being found on board at the time of capture, he concludes was landed at Havana; lastly, that the register [* 97] shown to him of the return cargo found on board at the time of capture, is not in the usual form of such registers. By the testimony of others, it appears a spoliation of papers had taken

¹ December, 1806.

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place, that part of the agreement between the master and crew, which should have been in the master's possession, not having been delivered up.

Whatever might have been the effect of the treaty formerly, is, since the order of the 24th June, 1803, very immaterial; that order was made expressly to regulate the neutral trade with the enemies colonies, and provides "that all such neutral vessels as are employed in trading direct between the colonies of the enemy and the neutral country to which the vessels belong, and laden with the property of inhabitants of such neutral country, shall not be interrupted in that trade, provided that such vessel shall not be supplying, nor shall have, on the outward voyage, supplied the enemy with articles contraband of war." This was the criterion by which the present claimant might have ascertained upon what foundation his ideal national privilege stood, before he engaged in a trade so hazardous and unprecedented. This order alone contains the terms upon which, at present, all permission to trade with the colonies of the enemy rests; the consequence of extending which to the length contended for, would be to ensure the Portuguese the privilege of carrying home colonial produce not only for their own consumption, but also the colonial produce of the Spanish colonies, which, considering the contiguity of the kingdoms of Spain and Portugal, would be the same as permitting their direct trade from Spain to her colonies at once. The principles laid down by the court below in the cases of *The Nancy*¹ and *The Richmond*,² will, therefore, be decisive of this case, and the greater quantity of contraband on board the prize must [* 98] be considered an aggravation of the offence.

Further proof is altogether inadmissible, as the whole property has already been claimed by Mr. De Silva, under a false description, and the voyage appears to be one with false papers, purporting a destination to Lisbon, but deviating into an enemy's port, under circumstances of suppression and fraud.

Dallas and *Addams*, for the claimant. The objections made to this trade are applicable in three different ways, in each of which the question has been considered: 1st, Fraud without illegality in the nature of the trade; 2dly, Fraud with illegality; and lastly, Simply illegality in the trade itself. From the inquiries made by direction of the court below, it would appear the question was there decided solely on the ground of fraud, and that had no such fraud appeared to

¹ Adm. Rep. vol. iii. p. 136.

² Vol. v. p. 325.

constitute part of the case, the transaction would have been deemed legal. Here the argument has principally been directed to the two latter points, and the property considered condemnable, either upon the ancient established colonial law, or the colonial law as regulated within the present war by the order of the 24th June, 1803. The error of the master in comprising different claims for different parts of this cargo in one general claim for Mr. De Silva of Oporto, it is conjectured, will have the effect of inducing the court not to grant any further opportunity of proving more distinctly the property of the several owners of the cargo, should the court consider further proof necessary. But it will be found altogether immaterial whether these goods are the property of one person or several. By the treaty

of 1654, this country acknowledges that Portuguese bottoms [*99] shall make * Portuguese goods and merchandises. The captors are not, therefore, in a situation to inquire whether these goods belong to one or more proprietors. By this treaty the property of even enemies on board would be protected, because the vessel is Portuguese. If, therefore, there be any necessity for further proof, this circumstance will not affect the claimants, and prevent its introduction. Upon the question of contraband, an objection is made which it is supposed must be fatal, from the terms of the order 24th June, 1803. Here it is submitted, that the pitch and tar appear to have been openly carried, without disguise or suppression, which, although it will not render it fair, if generally illegal, yet it materially alters the question from a common case of contraband. The pitch and tar not being carried out under false papers, cannot induce condemnation of ship and cargo on the return voyage. The term contraband is altogether relative in its meaning, as that which is contraband on board a Dutch vessel is not so on board a Swede. Pitch and tar are only liable to præsumption as being the natural produce of the latter country. Here, also, the owner of this property should be put upon at least the same footing as a Swede, from the protection afforded him by the terms of the Portuguese treaty of 1654, which admits that Portuguese ships make Portuguese goods and merchandises. From this treaty neither party can retreat by any act of its own alone. If, therefore, pitch and tar were, at the period of that treaty, considered goods and merchandises, they must be considered so still. Although we have since altered the determined meaning of the term contraband with respect to other nations, it must remain the same with respect to Portugal, and her rights remain the same.

unless it can be shown that some express stipulation has [*100] been entered into *to concede those rights. To determine this question we must examine the treaties themselves, for

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this is not the only treaty extant between this country and Portugal, and also inquire what was then the general law respecting contraband throughout Europe. An opinion given by Sir Leoline Jenkins, to be found in the second volume of his work, published about the year 1674, as to the character of these particular articles, is favorable to the present case, and seems to have considered these articles, under similar circumstances, not of a strictly contraband nature.

On referring to the articles of these treaties, it will be found there is no enumeration of articles of a contraband nature in the treaty of 1654; nor do pitch and tar form any part of the exceptions of that treaty. It has been denied these treaties have any thing to do with the regulation of the trade to the colonies. It is, however, remarkable that the eleventh and sixteenth articles of the treaty 1654 relate to the trade with America and Africa, and the eleventh to the trade to that with the East and West Indies.

BY THE COURT.

Is there any thing in that treaty which would legalize a trade at that time considered illegal?

No, my lord; but there is a wide difference between things then actually illegal, and those which have since been denominated illegal. The illegality here contended for is of modern date, consequent upon a change of circumstances.

COURT.

Yes; but it has been attempted to justify a trade by Dutch ships to the colonies upon the articles of the Dutch treaty, yet this was ineffectual, and the court condemned those Dutch vessels.

* The object of the Portuguese treaty was to grant the [* 101] Portuguese nation a decided advantage in trade over other nations; they are not, therefore, to be considered as in the same situation as other neutral merchants, as has been urged. Our policy has induced us to grant these facilities and advantages for obvious reasons. The eleventh article of the treaty 1642¹ provides, that subjects of the king of Great Britain may carry victuals and arms to Spain, so as not from Portugal itself, in the event of a war between Spain and Portugal, and that Portuguese subjects may have the same privilege should a war arise between Great Britain and Spain.

¹ This passage has not been compared with the treaty alluded to, having in vain endeavored to procure a copy of it.

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This has never since been changed by subsequent stipulation. The following treaty partakes of the same spirit. Under these circumstances it would be extremely hard to consider the case of such claimants liable to be affected by the general law of contraband as applied to other nations at the present day. Nor can the mere order of June, 1803, be taken to have new modelled, by its vague and general terms, the law of contraband with respect to Portugal, which had for its foundation these two treaties.

If the case should require farther proof, the claimants are prepared to afford every information. In the court below difficulties occurred, owing to the state of Portugal, and the impossibility of collecting proofs and transmitting them to New Providence within the time limited, there being no direct communication between Portugal and New Providence. The captors pressed for adjudication, and the property was condemned. The information required by the [* 102] judge below is partly unnecessary, from the original evidence adduced in the case. It has been said the two bills of lading were framed purposely to deceive cruisers. This would be productive of no advantage while the clearance was on board, which is a most material ship's paper. In both this and the invoice these objectionable articles are detailed without any attempt at disguise. The cargo being of a very miscellaneous nature, the different articles were too numerous to be contained in one bill of lading, two became necessary; and it is remarkable the certificate of the British consul states these goods to be the property of Portuguese subjects, as appears from the bills of lading which were duly shown to him. The imputed suppression or concealment of that bill of lading containing these articles, is falsified by the positive admission of this British consul; and these bills, as well as the other ship's papers, all equally explicit, were shown to several searching vessels in the course of the voyage, any one of which papers must have acquainted them with the nature of the cargo. The whole transaction is characterized by the utmost fairness, and it is presumed, whatever may be its legal effect, with respect to this part of the cargo, it will at least procure the claimants the advantage of introducing farther proof as to the remainder, if such further proof shall be considered necessary.

King's Advocate, in reply, argued, that from the insufficiency of the proof of property, and the positive testimony of some of the witnesses, who clearly proved an enemy's interest therein, this ship and cargo being thus falsely represented was liable to condemnation.

The Santissima Coracao de Maria. 2 Acton.

* *Dallas* and *Addams* strongly objected to the course pursued. [* 103] The reason in the captor's case solely applied to the illegality of the trade either in respect to the orders of council, or the contraband nature of the goods. A new ground of impeachment had since been taken, the insufficiency of the proofs of property. This was taking an unfair advantage of the claimants, who should have been informed by the captor's case what they had to defend. Indeed, for fairness, it should be understood at the bar, that when it was intended to pursue this ground of impeachment, one of the reasons in the case should distinctly state the objection as to property.

As to the trade in which this vessel was engaged, the order of June, 1803, was precisely applicable, and furnished sufficient ground for condemnation. The nature of such a transaction would not now be decided by a reference to the construction put on contraband in the year 1654. The term contraband, in the order, related to that which in general acceptance was considered contraband when the order issued. No doubt could be entertained of its meaning in 1803. Pitch and tar had then been held contraband by the decisions of these and other courts. It had been argued, although the treaty would not certainly protect Portuguese subjects in a trade clearly illegal; yet such illegality must be proved to be of a contemporaneous nature. Since the decisions above mentioned, this subtle distinction, if it could ever avail, must have been futile. But the principle upon which it was attempted to be established was highly objectionable. Supposing a material change had now *taken place in the art of war, and those articles now [* 104] considered contraband should be disused, and others substituted which had been hitherto considered inoffensive; and that subsequent to such a change, an order of a similar nature had issued, would not every court of justice construe an order prohibiting the importation of contraband into the colonies as adapting itself to such a change?

BY THE COURT.

SIR WILLIAM GRANT. As it has been suggested that one treaty permits even the exportation of arms to a belligerent; if counsel are disposed to go that length, it may be contended there can be no contraband with respect to Portugal.

Addams. So far as respects the inference of Portuguese subjects in a war with Spain and Great Britain, it certainly might. In this treaty there is no enumeration of contraband.

JUDGMENT.

SIR WILLIAM GRANT. It never was the intent of this treaty to except the Portuguese from the general prohibition to trade with the colonies. Portuguese subjects must now take the law relating to the colonies to be the same with respect to them as other nations. The late order regulating the trade by neutrals to the enemy's colonies contains specific exceptions, one of which is an express prohibition to carry contraband outwards, and it is of no consequence what, in 1654, was the precise meaning of the term. What is the idea conveyed by the order of June, 1803? This applies to [* 105] * all sorts of contraband then existing. It was their duty to have ascertained, when there was such just reason for doubt and apprehension with respect to this undertaking, that the opinion they were disposed to entertain of the treaty was well founded. It is to be regretted, certainly, that the party should have been so far mistaken, and took no pains to provide satisfactory information upon this head; and it appears to us the claimants have now taken up a question upon which there cannot be entertained a doubt. The sentence of the court below must, therefore, be affirmed.

Dallas applied for the claimants' expenses, as they had been led into considerable intricacies and expenses by the unusual mode prescribed for furnishing proofs by plea and proof, and when so much doubt had appeared to have existed in the mind of the judge of the court below, from the course which he had adopted, it was not unreasonable to suppose they might have considered themselves exempt from the ordinary restrictions imposed on other neutrals in the conduct of this trade.

Application refused.

SENTENCE.

Pronounced against the appeal, affirmed the sentence of the court below, condemning the ship and cargo, and remitted the cause.

* THE FRANKLIN, Forsyth, master.

[*106]

June 20, 1811.

A case of rescue.¹ Argued that as the ship and the cargo were the property of different persons, this description of case not hitherto decided, and the owners of the cargo were not bound by the misconduct of the master. Objection overruled, ship and cargo condemned.

AN appeal from a sentence of condemnation of ship and cargo, pronounced by the judge of the Vice-Admiralty Court of Gibraltar, as rescued from the prize-master put on board whilst proceeding to a port for adjudication.

The *King's Advocate*, for the captors, adverted to the circumstantial evidence exhibited in the case, proving the fact of the master and crew having risen upon the prize-master and his men, whom they had confined below, whilst the ship's course was altered for her own port of destination. In the prosecution of which intention this ship was again captured. He now prayed the sentence might be affirmed.

Dallas, for the claimants, submitted that in this case, notwithstanding the vessel's course had been changed by the interference of the master and crew, yet it would be difficult to make out a case of rescue from the evidence, as it appeared no actual force had been employed; but that from the improper conduct of the prize-master, as it was stated in an affidavit made by one of the crew, the ship was considered to be in danger; and by the consent of the remaining parties, it was resolved the vessel should be navigated by the master. The mere circumstance of the vessel's course having been shaped for a different port from *that to which she had [*107] been bound by the direction of the captor, would not, he contended, affect the interests of the claimants upon the principles laid down by the court in the case of *The Pennsylvania*, M^rPherson;² when the court held that, "there was no duty imposed upon the master or crew to navigate the vessel to a port for adjudication." To secure the capture was said to be a duty imposed on the captors at their own peril, in which, having failed by providing only a com-

¹ [The Dispatch, 3 C. Rob. 278; The Topaz, 2 Acton, 20.]

² 1 Prize Appeal Rep. p. 37.

The Franklin. 2 Acton.

plement of men inadequate to navigate the vessel; the master, on resuming the command, had sailed for his own port, and the court decreed restitution. The property of the greater part of the cargo was not that of the owner of the ship, which raised a very material consideration, whether the fate of a vessel condemned for a rescue, would involve the interests of other persons who were the shippers of the cargo, and totally unconnected with the owners of the ship. This was altogether a novel question, and one which, upon a review of the cases, had not yet been decided. There was, certainly, a *dictum* recorded in the case of *The Catharina Elizabeth*,¹ where the court said, the consequence of a rescue, "had it been by a neutral master (the master there being an enemy) would undoubtedly reach the property of his owner; and the judge thought it should extend also to the confiscation of the whole cargo intrusted to his care." It must be observed, however, this was merely a *dictum*, the case before the court not at all comprising such a question. Upon the obvious principles of justice and equity, when there were separate owners of the cargo and ship the conduct of the master ought not to bind the owner of the cargo, who could not be considered as having [* 108] *reposed any confidence, or capable of exercising any control over him. Upon this equitable principle the court had uniformly regulated its decisions with respect to the other questions, where it had been argued the act of the master should affect the interests of other persons. In the cases of breach of blockade, of contraband, and of despatches—in *The Mercurius Gerdes*,² when the master committed a breach of blockade, with notice, the owners of the cargo were admitted to farther proof, it appearing that the master was not specially constituted their agent, nor were they then cognizant of the existing blockade. Other cases of a similar nature had since occurred which sanctioned the principle upon which the court then proceeded. In *The Atalanta*,³ when despatches had been carried to the enemy, both ship and cargo were condemned, because the whole expedition had been intrusted to the supercargo, who was acquainted with the nature of the despatches, and in whom the owners had reposed confidence. In the next case,⁴ the master was part owner of both ship and cargo, and constituted agent for the residue; and there, also, upon the same grounds, the ship and cargo were condemned. In the next, *The Sultan*,⁵ the ship was condemned, and the cargo was restored, including even that part of it belonging

¹ 5 Adm. Rep. 232.

² Adm. Rep. 80.

³ 6 Adm. Rep. 440.

⁴ *Constantia Holbeck*; 6 Adm. Rep. 461, *in notis*.

⁵ *Ibid*.

to the owner of the ship, a distinction having been taken that the master did not appear to have been appointed agent of the cargo, and although his general agency for the ship would affect that part of the property, the residue of the same owner's property should not thereby be affected. This was carrying the principle to its utmost bounds.

* *Arnold*, same side, argued — First, that the rescue was [* 109] improbable, if not impossible; it appearing that the crew consisted only of four effective persons, a boy, and an aged cook; whilst the prize-master's force consisted of seven men, all effective. And, secondly, that no rescue was proved to have been attempted, no force had been resorted to; and the only fact which could serve as a pretext for such an imputation was that of throwing overboard the arms which lay on the quarter-deck in an open basket.

COURT.

SIR W. GRANT. It is in our minds, from the evidence adduced, clearly a case of rescue.

In the few cases of rescue to be found reported, the present question had never yet arisen. In *The Dispatch*, Addison,¹ the master and crew, with the supercargo, rose and rescued the vessel. Here all parties were bound by the act of their agent; and both ship and cargo were condemned. In *The Carmelite*, Ash, 15th December, 1802, ship and cargo belonged to one person. In *The Washington*, the ship and cargo were both the property of the same person, and both condemned. In *The Mars*,² the ship and cargo were both condemned, the cargo being the property of the ship's owners, the supercargo, and two others. In none of these had, therefore, the question arisen. Having no direct authority, the question should be argued by analogy. In *The Alexander*, Ages,³ a case of breach of blockade, where the ship was condemned, and it was objected that the owners of the cargo were not bound by the act of the master. The judge admitted that had the master deviated, under particular directions from the ship's owners, to land part of his cargo at the * blockaded port, unknown to the rest of the shippers, such [* 110] partial instruction might lead the court to consider with indulgence that distinction, in favor of those shippers who had meditated a legal voyage; but as the case stood, no such distinction

¹ 3 Adm. Rep. 278.

² Lords, 10th June, 1809.

³ 4 Adm. Rep. 93.

could be raised from the facts proved. Upon these authorities, he contended, the claimants were here entitled to an equal, if not greater share of favorable consideration. In *The Adonis*,¹ the claimant's case failed, because the fact of purity of intention on the part of the owners of the cargo was not shown; it would have been otherwise if the fact had been established.

King's Advocate, in reply, said — If the question were new, it was the highest time it should be settled by a solemn decision. Although acts of a master did not in all cases bind, yet in most they did; and he apprehended, particularly in those instances where the principle was found necessary for the protection of belligerent rights; if so, the present case would be included. Where no possibility of privity between the master and his employers or freighters existed, courts had relaxed the rule respecting blockades, and granted greater indulgence to the parties. Where the possibility existed, they had acted directly the reverse. Infinite danger would attend the admission of shippers to distinguish their purpose from that of their master. The case of contraband and of despatches, did not support the principle contended for. The enforcement of the right of the captor to bring in for adjudication, upon which so much depended in the conduct of a war, was too important not to claim the particular [* 111] * attention of the court. It was such a necessary right, and acquiescence on the part of the neutral was so imperatively enjoined, that any infraction of the implied compact would be attended with the most dangerous consequences, and should, therefore, be punished in the most exemplary manner, by the confiscation of the whole property engaged. Counsel had urged that where there was no case in which a diversity of interest had been brought before the court for sentence. It might be true; but the case of the Swedish convoy,² he thought, would be quite decisive in principle upon this case, when the court condemned all the property withheld from search.

Dallas objected — That, in the Swedish convoy case, the court had decided on different grounds from those submitted here for condemnation, the owners of the cargoes having put them on board with knowledge of the intended convoy and its purport.

The court took time to deliberate.

¹ 5 Adm. R. 261.

² 9 Ibid. 408.

The *Minerva*. 2 Acton.

June 25th, 1811. The court pronounced against the appeal, affirmed the sentence of the court below, condemning the ship and cargo.

* *MINERVA*, Glen, master.

[* 112]

July 25, 1811.

Question on joint capture. A postponement, on the part of the actual captor, in taking a prize which might, during several hours previously, have been reduced into possession by such actual captor, during which the constructive captor, a king's ship, remained in sight, and communicated by signals with the actual captor, objected to as fraudulent, no intimation having been given of the suspicions entertained of the prize by the actual captor; in consequence of which the other bore away from the prize, without affording any coöperation, and was out of sight at the time of the capture, which occurred after dark.¹

Decree pronounced for the exclusive interest of the actual captor, the foregoing circumstances being held insufficient to found a claim to joint capture.

In the Vice-Admiralty Court, at Jamaica, the judge had pronounced for the interest of his Majesty's ship *La Pique*, as joint captor of the prize in question with his Majesty's brig *Goelan*, and rejected a similar claim on the part of two other vessels; against which sentence, so far as respected the interest of *La Pique*, the actual captor appealed.

Dallas stated the respondent's case. The reasons adduced for affirming the sentence pronounced in the court below were: "Because *La Pique* was in sight, and known by the commander of *The Goelan* so to be, from between three and four o'clock, P. M., till dark, during any part of which time *The Goelan* might have made the capture in question; and, 2dly, Because the interest of a ship in sight cannot be defeated by a delay wilfully made till after dark, with a view to defeat that interest." The joint captor's allegation pleaded, amongst other things, that on the day of capture, about three o'clock, two vessels were discovered by *La Pique* in company, about three leagues distant. Soon after *La Pique* and one of the ships in company exchanged signals, and became known to each other; she proved to be *The Goelan*; and, about six, lowered a boat and sent some persons on board the prize, *La Pique* being still in sight, but the light-

¹ [For cases as to joint captors, see *The Nordstern*, 1 Acton, 128, note.]

ness and variable state of the wind prevented her coming up with them. And, lastly, That if The Pique was not in sight at the precise moment of the actual taking possession of the strange ship [* 113] by The * Goelan, it was owing to the fraud practised by the commander and crew of The Goelan, in laying by and hovering about the strange ship, and postponing such taking possession of her until after it was dark, with the view and intention of excluding the commander and crew of The Pique from sharing in the capture; the said commander and crew of The Goelan well knowing that, because of the lightness of the wind and the distance The Pique was off, she could not come near to The Goelan in time to defeat this purpose; that the commander and crew of The Goelan might have taken possession of the strange ship at any time during the said afternoon, but they thought it best to defer so doing until dark, with the view and intention aforesaid." The counter allegation of the actual captor admitted the fact of sight until five o'clock, and the interchange of signals, as well as the passing and repassing of a boat between The Goelan and prize; but objected to the possibility of the latter's being seen by La Pique, having then been out of sight upwards of an hour. It was so dark when possession was taken, that, although within hail, The Goelan could not be seen by the prize; and further denied that The Goelan had postponed taking possession until dark with any fraudulent intention. Finally, maintained that La Pique might have come up with both vessels, had she not been steering a contrary course direct for Port Royal. The examinations of several witnesses corroborated the facts alleged by the joint captor. The mate of the prize deposed the prize had previously been captured by The Goelan, and, after adjudication, released; that the prize departed from Port Royal again, on the 1st January, The Goelan in company. About six the prize

[* 114] was boarded by The Goelan again; * a boat returned to The Goelan with Glen, the master; and afterwards, about seven, a prize-master and crew came on board. Watson, a seaman on board the prize, said, at one o'clock that day La Pique was within three miles of the prize, standing up to her. On exchanging signals with The Goelan, she tacked and stood away; about five o'clock The Goelan hailed the prize, and again a quarter after five. She, about that time, made signals to La Pique, and sent her boat on board the prize, which carried back the master about six, then nearly dark; when the boat came first, La Pique was in sight from the round tops, and about three leagues distance. The boat's crew had said, The Goelan had been sent out by the admiral expressly to make this capture, but would not attempt it until they had got out

The Minerva. 2 Acton.

of sight of La Pique, the harbor, and shipping, that she might be exclusively her prize. The purser of La Pique, a releasing witness, corroborated this statement; adding that, at a quarter past four, he saw The Goelan and prize in company; he then went below, and saw them no more. La Pique could easily have come up with The Goelan and prize; he considered the prize under protection of The Goelan. Five days after, the captain of The Goelan told him, that, in consequence of La Pique's heaving in sight on the 1st January, he was obliged to run considerably to leeward to take possession of The Minerva. Upon this statement of evidence, there could be little doubt the capture was postponed for a considerable time, with the intention of defrauding the joint captor; and, upon the authority of what had fallen from the court below, in the cases of *The Robert*,¹ *Sirius*, and *Waaksamheid*,² the court would feel it imperatively its duty to defeat the injurious effect of such a fraud. And taking the facts of the case as (if no such fraud had been interposed) they * in all probability would have been, would [* 115] affirm the sentence pronounced in favor of the joint captor.

King's Advocate and *Carr*, for the appellant, contended the asserted joint captor's case had not been sufficiently made out: more particularly, as it had been repeatedly decided, a claimant under such circumstances could only recover by the strength of his own case. The proof, therefore, should be very strong indeed, to induce the court to pronounce for an asserted interest where the most positive oaths of several witnesses established the fact, that this vessel was not, nor, indeed, could not, be in sight at the time of capture. Such was the testimony of the master, mate, and supercargo of the captured vessel. The second ground upon which these parties had founded a claim was, that of a mere accidental view of this capturing vessel and prize during a part of the day in the evening of which the capture was made. It never had yet been determined, that obtaining sight of even a chase under such circumstances would entitle a vessel as joint captor. There must necessarily be proved either a joint chasing, a coöperation, or an assistance afforded to the actual captor by the presence and proximity of the asserted joint captor. None of these circumstances formed part of the case of this vessel as detailed in the evidence. La Pique had steadily maintained her course, which was said to be from the Spanish main to the port from whence these two vessels had a short time before departed, and having

1 3 Adm. Rep. 194.

2 3 Ibid. 1.

merely exchanged signals with The Goelan, bore direct for Port Royal. What had been said by one sailor, that La Pique was at one time within three miles of the prize, and might easily [* 116] have borne down on her, was consistent enough, as * the prize was leaving that harbor to which the other was directing her course. This accounts for the contradictory nature of some of the evidence in this cause; as it for a time appeared as though La Pique was in pursuit. From the nature of her course it might have appeared so, but there is no ground to believe any such thing was in contemplation; neither was it natural to conclude this vessel, just coming out of Port Royal, and accompanied by a king's ship, could have been an enemy. There was equally as little foundation for the imputation against the captor, of having wilfully postponed the capture for the purpose of securing a prize exclusively to himself. It was not pleaded in the allegation, that it was the duty of The Goelan to have hoisted a signal of an enemy in sight. The conversation alluded to by the purser of La Pique was totally undeserving of credit; first, as it was the evidence of a releasing witness, unsupported by any other witness, although he admitted a lieutenant was then present; and next, as it was impossible the captain of The Goelan must not have been aware of the danger he incurred by any such avowal, without the possibility of obtaining thereby a counter-vailing advantage. It never, however, could be maintained, that the officers of his Majesty's navy were bound to publish their suspicions of the property of any unarmed vessel they might probably have an intention of examining, or were even proceeding to examine; it would be attended with no public utility, and would impose a great hardship and loss upon his Majesty's cruisers. For the following, among other, reasons it was urged the court would pronounce for the appeal:

Because La Pique was not in sight at the time of capture; and had not manifested any disposition to chase or examine the prize in question:

[* 117] * Because the suggestion of a wilful postponement of seizure is unfounded, and would not, if true, support the legal consequences that have been attributed to it on the part of La Pique.

Addams, in reply, stated, that by the confession of all parties, the prize had been within the reach of The Goelan, so that at any period of the afternoon he might have taken possession of this ship. The postponement was, therefore, established, with what intention must be obvious. *Watson* had distinctly said, La Pique had left off

The Minerva. 2 Acton.

chase as soon as she distinguished The Goelan's signal. The fact being established that she was in chase, it was impossible not to presume that this vessel, being a king's ship, was then as well as at all other times actuated with the *animus capiendi*. King's ships were, therefore, in such a case entitled to share merely on the circumstance of sight; for, by being in sight alone, they conveyed that constructive assistance and intimidation necessary to found a claim. The only limitation to this rule arose from the circumstance of the ship so being in sight either being in a state which rendered it impossible she should render any assistance, as by having her sails on shore, &c., or by a wilful discontinuance of the chase, without being induced thereto by any act or omission by the principal chasing vessel. There can be little doubt what was the intention of La Pique in chasing, or what impression The Goelan's signal must have made on her, so as to induce her to discontinue chasing; it must have conveyed the idea to La Pique's commander, that there was no suspicions entertained of the prize. It would be for the court to determine how far such a representation by one king's ship to another was consistent with the public service, and * whether in [* 118] such circumstances he should not have communicated the signal of an enemy or a suspicious sail.

On the fact of sight, at the moment of capture, it was necessary to observe, that in point of law, the effect was the same, whether a cruiser kept close by a suspicious sail so as to secure the possession when he pleased, during which postponement of reducing the prize into actual possession another cruising vessel continued in sight; or actually boarded her in her sight. It, at least, was The Goelan's duty to take immediate possession; the postponement was contrary to the practice of his Majesty's ships; and where no other reasons than fraud could be assigned for such neglect it is the duty of the court to interpose, and defeat the fraudulent intention.

SENTENCE —

Pronounced for the appeal, reversed the sentence appealed from, so far as pronounced for the interest of the commander and crew of La Pique, as joint captors of the prize; and pronounced the same to have been captured by his Majesty's brig, Goelan, alone.

[* 119]

* THE REBECCA, M'Neil, master.

July 18, 1811.

Interference in the close trade of the enemy's colonial establishment. Case of a neutral taken in a cargo at Batavia for account of the Batavian government, and entering into an engagement to carry the same with three persons in a civil capacity, to Decuma, a Dutch factory at Japan, with a proviso, that should war break out between the Dutch and the government she should be free from capture or detention on her return; and that on her part she should do her utmost to protect and safely convey the property to its destined port. Held to be in violation of the orders of January 7, 1807, and 11th November 1807, and a departure from the neutral character.

This ship sailed from Baltimore to Batavia, and, after her arrival there, was chartered by the Dutch government on the 17th of April, 1809, for the purpose of transporting a cargo from thence to Japan and back, and, being laden with a valuable cargo of sugar, coffee, spices, &c., sailed under American colors for Decuma, a Dutch factory in the island of Japan, and was captured in the prosecution of such voyage, on the 24th of May, 1809, and carried to Calcutta, where the usual proceedings were instituted.

The cargo being admitted to be Dutch property was, of course, condemned.

The judge also rejected the claim of the supercargo for the ship as the property of Messrs. Smith and Buchanan, and Messrs. Hollis and M'Blair, of Baltimore, and pronounced "the ship to have been taken in the prosecution of an unlawful voyage between the Dutch port of Batavia and the Dutch factory at Decuma, in Japan, in violation of certain orders, issued by his Majesty in council on the 7th of January, 1807, which forbid neutrals to trade between the ports of his Majesty's enemies, and also as having been taken in prosecution of an unlawful voyage from the Dutch port of Batavia, in violation of certain orders issued by his Majesty in council on the 11th of November, 1807, which forbid neutrals to trade from the colonies of the enemy; and also as having been, by nature of her employment in the voyage, incorporated into the Dutch commercial marine, and during such employment, having become a Dutch ship," from which sentence, so far as related to the condemnation of the ship, and the refusal of freight, the claimants appealed.

The *King's Advocate* stated the captor's case. This vessel had

The Rebecca. 2 Acton.

long been engaged in the trade from Baltimore to Batavia, supplying that colony with necessaries, wine, and dry goods. In the outward voyage the cargo consisted almost entirely of flour. From her intimate connection, therefore, with this colony, she had been considered as eligible to be intrusted with that part of the trade of the colony, which for ages it had guarded with the most scrupulous jealousy; and which nothing but the extreme difficulty Dutch vessels had experienced in eluding British cruisers, could have induced the Batavian government to intrust to strangers. An agreement by charter-party for this purpose was entered into between the director-general of the royal finances and revenues in Asia, under the express authority of the governor-general Daendels and Mr. Higginbotham, the supercargo, who appeared, by the letters of instruction, to have a discretionary authority over the concerns of this vessel, although nothing in those letters pointed to any such expedition as that in which the vessel subsequently engaged. Several articles of this charter-party which had been drawn up with extreme caution and minuteness, were altogether exceptionable and perfectly irreconcilable with the character and conduct of a strict neutrality. By the terms of the contract this vessel was "hired for and on account of the governor-general in India, for the purpose of completing a voyage from Batavia to *Japan, and back to Souza Caya, for the [* 121] sum of \$35,000, to be paid not in specie but in Batavia produce to that amount; the supercargo binding himself and the officers of the said ship to adhere in every respect to the instructions of the Dutch government in the prosecution of this voyage, the freight-money to be paid after the said ship should be moored in the roads of Souza Caya;" the government to have a right to send with this ship at most three persons employed in a civil character to and from Japan; the ship to be free from anchorage-money at her return to Souza Caya, and also all similar charges on her arrival at Japan; as those charges were to remain for account of the Dutch government. By another article it was further stipulated; "That if, after the signing of these agreements, and before the same on the side of the second signer (namely, the supercargo) be completed, it should appear that the United States of America were involved in a war with the kingdom of Holland, or any of her allies, the said ship Rebecca, and any thing belonging to her, by her return to this island, shall not be considered as an enemy; and the second signer, although such a war should exist, shall always be entitled to the full freight-money stipulated by article first, nor shall any injury or molest be done to the said ship, or any persons belonging to her, during her stay in the harbor or roads of this island, or by her departure from

here; nor shall the said ship on her departure from here be liable to be captured by any ship or ships of this colony, during her passage in the Indian Seas, but to the contrary, every assistance shall be given to the same, even as in time of peace. The second [* 122] signer * binding himself in the meantime, that if in case he, during the voyage, should have information that such a war had taken place, the ship, notwithstanding all that, shall return to the place of her destination, and that by avoiding meeting any ships every exertion will be done to the benefit and interest of his employers." This last stipulation must affect the ship, as it stripped her of all her national character, and insured to this vessel the advantages of a new character in the event of a war breaking out, which was then very generally expected in that part of the globe. She was to be exempt from the operation of supervening hostilities; not only she relinquished her national character with respect to Holland, but even stipulates to renounce her duty to her own government, by endeavoring to avoid other vessels in order to secure the property of the open enemy of her own nation and government. Thus the abandonment of her national character by her agent's own act, was in all respects complete. The stipulations and concessions made by the Dutch government proved that government considered the abandonment complete; and, as a matter of course, every advantage a Dutch ship could have had upon such a voyage, it appeared, were granted to her also, and she became in effect a Dutch vessel, with all the immunities and privileges of such vessels in those seas.

The nature of the voyage itself was also a sufficient ground of condemnation. The order of the 7th of January, 1807, had interdicted a trade by neutrals between ports of his Majesty's enemies, or ports so far restricted by those enemies as that British vessels might not freely trade thereat. Hence a trade between Batavia

[* 123] an enemy's port, and Decuma, a factory of the enemy, and

Japan, which no British vessel would be permitted to enter, was clearly within the meaning of this order. A subsequent order, issued the 11th November, the same year, enlarges the prohibition; and, amongst other places, declares all ports of the enemy's colonies subject to those restrictions, in point of trade and navigation, as if the same were actually in a state of blockade, with certain exceptions, none of which exceptions were at all applicable to the case of this ship; the voyage outwards being direct between two ports in the colony, and the return voyage to another port of Batavia.

The appeal for freight was resisted on the ground that, as the freight had been agreed to be paid on the return of the ship, which, in fact, never took place, the capture being made on the outward

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voyage, no freight-money had been earned. The reasons for condemnation were :

1st. Because the trade was in violation of his Majesty's orders in council.

2dly. Because the ship is liable to be condemned as a Dutch vessel, being taken as in prosecution of a voyage from a Dutch settlement to a Dutch factory in Japan, under affreightment to the Dutch government, for the special protection of the Dutch trade, and for the conveyance of the officers of the Dutch government who were on board.

And as to the appeal against the refusal of freight.

3dly. Because it appears, by the charter-party, that no freight was to be paid on the event, which happened, of the vessel being captured before her return to Souza Caya.

Dallas and Adams, for the claimants. By the sentence of the court below, it appears the judge proceeded *to con- [* 124] demn this vessel upon these following grounds : First, on the order of 7th January, 1807 ; secondly, on that of 11th November, 1807 ; thirdly, on the adoption of this vessel into the Dutch marine ; and lastly, on the stipulation to convey and the actual conveyance of certain persons, in an official civil character, to Japan. The discussion of these several grounds for condemnation will prove one of considerable nicety, and the subject altogether novel, and for perspicuity each shall, in their order, be examined distinctly and apart. The order of the 7th January prohibits a trade by neutrals between ports of his Majesty's enemies, or with ports so far under their control as that British vessels may not freely trade thereat. Here one of the ports is a Dutch port, but the other a port of the empire of Japan, therefore not within the order ; neither can the latter be considered a port over which the enemy has such a control as excludes British vessels. The prohibition has long subsisted, and is the act of the Japanese government, not of the enemy. The restriction, therefore, does not amount to an interposition in the war, by shutting out the British. It extends equally to all other European nations, and is merely a peculiar privilege granted to the Dutch, which existed previous to, and probably will exist subsequent to, the present war. This description of trade (even supposing the order was intended for any other than European ports) is not, therefore, within the meaning of this order.

The order of 7th November, imposing a blockade on the ports of France and her allies, or any country at war with his Majesty ; ports in Europe from which the British flag is excluded, and colonial

ports, cannot apply to this description of trade. These two [* 125] ports * are not ports of France, her allies, or his Majesty's enemies, nor ports of Europe from which the British flag is excluded. Neither can they be comprehended within the meaning of that part of the order prohibiting trade with ports in the enemies' colonies. Whenever doubt exists as to the meaning of terms, it is a useful rule that such should be considered with reference to the subject-matter. The common acceptation of the term colony is very vague, and sometimes is used to express most descriptions of foreign establishments; but the idea annexed to it by the different nations of Europe, in their disputes respecting the trade of their colonies, is sufficiently precise and determined. Where mention is made of a colony, it is always understood to be a settlement possessed of a civil government, a military force, and the means of maintaining by force a prohibition to trade there in time of peace. The avowed purpose of an European government is to make a nominal blockade in its colonies amount to an actual blockade. The national character of Batavia, with reference to these points, has been already determined by the judgment delivered in *The Patapsco*, Hall,¹ not to be of so close a colonial nature. And it will require little investigation to discover, that the settlement or factory at Decuma has no pretension to any such distinction or consideration. There the Dutch have never possessed any regular government or force, erected there any fort, or obtained from the Japanese government any grant of the soil. Travellers unite in describing this situation as one of the most irksome and humiliating in which Europeans could possibly be placed. The trade thither by the Dutch is periodical. On the arrival of these vessels, they are compelled to deliver up [* 126] all their arms and ammunition, * which are not returned until the day previous to their departure. These precautions and restrictions are the natural effects of the Japanese jealousy, which does not permit strangers to learn even their language. Whatever political regulations, therefore, are here established, they are part of the policy of the Japanese government, and not those of the Dutch. The exception in favor of the Dutch has for its object the importation of their merchandises, which are paid for in the produce of Japan; and the extraordinary profits derived from this trade have induced the Dutch to submit to the most rigorous restraints, in order to keep it.² From such facts it must be inferred, that the Dutch have merely a permission to trade to this particular port, and their

¹ Prize Appeal Cases, 270.

² Montesquieu's *Esprit des Loix*, liv. xx. c. 9.

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establishment there (if such it may be called) cannot with any propriety be denominated a colony. It is equally obvious that, as the prohibition continues in force not only against his Majesty's subjects, but also all other European nations, the Dutch excepted, it is not within either the terms or spirit of the order.

The third ground assigned for condemnation by the judge below involves a question of the greatest magnitude to both neutral and belligerent nations. For the first time it has been decided that a neutral in a permitted port may not enter into a contract to take on board innocent articles, and navigated by her own master and crew, her papers fully and accurately avowing the nature of the property on board, depart for another neutral (or at least not prohibited) port. There is no case to prove such ship should be considered an enemy's ship, or adopted into the enemy's marine. In the early cases reported in the Admiralty Reports, where the court considered the property *liable to confiscation, the sentence proceeded [*127] either upon the fact of the vessel's having continued after a declaration of war in the habitual trade of the enemy, navigated by an enemy's master and crew, as in the case of *The Vigilantia*; ¹ or upon the circumstance of a transfer being made of such vessel to a neutral during a war, and yet continuing in her former course of trade from and to the enemy's port.² But neither these cases, nor any other reported,³ contain the doctrine that a neutral vessel, fairly and openly chartered to the enemy under the flag and pass of her own country for a particular voyage, is to be considered adopted into the enemy's navy. Nor can the stipulation entered into, that in the event of a war breaking out between France and America this vessel should be exempt from its operation, be strained so far as to infer that such a vessel was actually adopted by the Dutch government, it amounted to no more than a stipulation of honor and good faith; and the American owner or agent was justified in adopting a system of reciprocity, by stipulating to endeavor to protect the Dutch property on board by all fair and honorable means.

Finally, the passengers found on board are not persons invested with such a character as can affect the property of these claimants. One appears to have been the agent appointed by the Dutch government, to superintend the sale of this property. Some inconsistency is certainly observable in the accounts given of this gentleman by the different witnesses who speak to this point. The supercargo says this Mr. Creitoff went out as governor, Belmore as pilot, both

¹ 1 Adm. Rep. 1.

² Embden, Meyer, Ibid. 16.

³ Eendragt, Broetjias, Ibid. 19.

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were Dutchmen; but the witness states he knows nothing of their commission. The mate states his belief that Creitoff was [*128] going as resident to Japan; he also knows of *no commission. Belmore was put on board to pilot The Rebecca to Japan and back. Both these witnesses agree in stating neither of these passengers had any concern, directly or indirectly, in the ship or cargo. The second mate states more explicitly that the Dutch government were the laders and owners of the cargo; it was consigned to Mr. Creitoff, passenger on board, who was going to Japan, as agent for the Dutch government. He had some private trade on board; was a writer in the Dutch service, and went to be resident and agent at Japan; had no authority over ship or cargo, except as eventual consignee of the cargo. Both these persons were necessary to protect the interest of the laders of the cargo; one as pilot, the other as agent to transact their business at Japan and ship a return cargo. Whether he was to have remained at Japan after this duty had been fulfilled, or return with the vessel, will be immaterial. As far as he is concerned with this transaction, he appears unquestionable in a commercial character, and, as such, he is recognized in that article of the charter-party, which stipulates that the government shall have the privilege of "sending one, two, or, at most, three persons, employed in a civil character, with this ship." The case, therefore, before the court is one of complete novelty. No case has ever yet occurred where persons found on board in the employment of the enemy, purely in a civil capacity, have induced condemnation of this ship. The transportation of persons in the military service of the enemy has long been decided to be an interposition in the war, affecting the ship with the penalty of confiscation. By referring to the three principal cases in which this principle has been recognized, it will be found that in none of them¹ did it appear the persons so carried had any collateral employment with the [*129] *ship or its cargo. The facts spoke strongly, and the attention of the court was at once fixed by the discovery, that the transportation of those persons was the chief purpose of the expedition, however it might be colored with the semblance of a mercantile transaction. In the case of The Carolina, 150 dragoons had been transported to Alexandria. In The Friendship, the judge, in pronouncing condemnation of the ship, observed there were but a few goods on board, and those of little value; but her actual cargo was of another kind, and concluded the vessel had no commercial

¹ Carolina, 4 Adm. Rep. 256; Friendship, 5 Ibid. 420; Orozembo, 6 Ibid. 430.

character belonging to her, that could be said to arise out of the nature of her lading. These cases bear no resemblance to that before the court. Here is a very valuable cargo on board; the conduct of the vessel strictly commercial; the connection between these two persons on board and the cargo perfectly consistent with the course of trade in which the vessel is found engaged. It is a question of the most serious import whether a vessel fairly chartered for a voyage from a permitted to a permitted port, without any attempt at falsehood, fraud, or the introduction of contraband, (proceeding on such voyage,) shall be subjected to the penalty of confiscation merely from the circumstance of two persons being found on board, neither of a military or political description, but acting as the agents of the Dutch East India Company, in whose service, it appears, the principal was merely a writer or subordinate officer in a civil department. In the case of *The Orozembo*, a somewhat different opinion appears to have prevailed in the mind of the learned judge below. There some military persons, and two others intended to be employed in civil capacities in the government of Batavia, were found on board *that vessel. The learned judge, speaking of the [* 130] latter, said: "Whether the principle would apply to them alone, I do not feel it necessary to determine; I am not aware of any case in which that question has been agitated; but it appears to me a principle to be but reasonable, that whenever it is of sufficient importance to the enemy that such persons should be sent out on the public service, at the public expense, it should afford equal ground of forfeiture against the vessel that may be let out for a purpose so intimately connected with the hostile operations." However unfavorable this passing opinion appears to be, the circumstances of this case render it inapplicable; for here it does not appear the carriage of these two persons to Japan was the primary object. A valuable cargo is found on board, the charge of which is intrusted to them in their several capacities. They are, therefore, to be considered solely in the light of persons employed in a course of trade fairly and avowedly. Our belligerent rights permit neutrals to trade with and from the enemy's ports, by the ordinary mode of their commerce prior to hostilities. Can it be considered a deviation from the ordinary mode, that these commercial agents are carried out to protect a valuable cargo upon the voyage, and dispose of it to the best advantage? Connected as they are with that cargo, they should be considered a mere appendage thereto; especially as it has been shown that at Japan there actually is neither civil or military government to administer, on the part of the Dutch residing there.

King's Advocate replied — That it appeared to the court, [* 131] during the argument in the case of *The Cora*,¹ that the terms of the order of 7th January, 1807, would apply to ports in the Indian Seas as well as in the West Indies. The order was intended to prohibit all that species of trade between ports whence British vessels were excluded, and in which British ships could not participate. The order of the 7th January not being considered sufficiently comprehensive in its terms and operation, that of the 11th November, 1807, followed, ingrafted on the preceding order, to render it general to the world. The same policy which dictated the first produced the second; and should, therefore, guide its interpretation. Nor was the trade less objectionable, as to the national character of these two ports. Batavia being a colonial port of the enemy, and Decuma a close factory of the enemy in Japan, where this cargo was to be delivered to a Dutch governor, for account of the Dutch government, and not for general or public sale. The factory or settlement at Decuma was as much under the control of the Dutch government, as if the Dutch had possessed the territory for fifty miles round it. The arguments used by counsel to show that these ports were not colonial ports, proceeded on the assumption that the order was to be taken in its strictest sense, whereas the order was retaliatory, in consequence of the French decree; which vessels coming from Bombay, though not strictly within the meaning of the terms British isles or colonies, were considered to have violated. The same policy governed the order of 26th April, 1809, and showed most explicitly the intention of his Majesty's government to interrupt all trade of this description. It would, therefore, be quite indifferent whether Decuma was a colony or not; for this [* 132] vessel should have gone to her own ports from * Batavia.

There could be no doubt as to the adoption of this vessel into the Dutch navy, for she had been engaged in the service, not of an individual, but of the government itself, placed under the direction of two Dutch officers, in different capacities, and actually had on board Dutch colors, to be used, as it was said, as signals, on her arrival at Japan. If any thing were wanting completely to denationalize her, it was evident the agreement contained in the charter-party must have that effect, namely, that she should be exempt from the effect of supervening hostilities. This was a stipulation that could only be made by the government itself, and was, therefore, an actual adoption by that government. By this stipulation the American

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interest was to be sacrificed, her national character relinquished, and, in the event of hostilities, the vessel was to betake herself to the purposes of the enemy. This, then, was the criterion of adoption. Had war broken out before her return, no doubt it would have been between France with Holland, and America with Great Britain. Under such circumstances, how culpable a breach of national faith would the conduct of this vessel have exhibited, had she returned back with this cargo to Batavia. In the absence of direct authorities on this subject, reference should be had to the case of the Dutch fishing vessels, and De Coning's case. The carrying out the governor and another public officer was, in itself, sufficient ground of condemnation, being no less than a coöperation in the hostile purposes of the enemy. Counsel or skill were equal, or perhaps more advantageous to the enemy, than courage or absolute force. How these persons came to be carried out could only have been explained by the master's declaring himself ignorant of their situation in life; but, it was absurd, indeed, to suppose the incidental [* 133] circumstance of this vessel's carrying out a cargo, for account of the same government, could alter the principles of law which must be applied to this case, and induce the court to restore property impeached on so many valid grounds.

SENTENCE.

The court pronounced against the appeal, and affirmed the sentence of the court below, condemning the ship as lawful prize to the captor.

LYDIAHEAD, Stanwood, master.

July 25, 1811.

Upon an order for further proof, as to particular grounds for condemnation, the court will not permit counsel to argue for condemnation upon a fresh ground of impeachment, although disclosed in the further proofs exhibited by the claimants for restitution. The further proof being only a subject of investigation, as to the specific points in respect to which the court had required explanation.

THIS was a case of further proof. Upon the production of the further proof, it was confidently suggested, by the captor's counsel, that a fresh and sufficient ground for condemnation of the property was disclosed from some of the papers produced. A question, there-

fore, arose, whether the further proof being ordered by the court, expressly with respect to the property and destination back, the property might now be impeached upon this new ground.

Stothard, for the captor, stated this was a case of a vessel going from Marseilles to Gallipoli, without avowing such destination in her papers, and captured returning, as asserted, to Copenhagen. The course of her former voyage rendered her liable to confiscation on her return, according to the provisions of the orders in council, November 11th, 1807. When formerly before their lordships, the case had been ordered to further proof; the further proof now disclosed a fresh ground of condemnation.

[* 134] * *Dallas*, for the claimant, objected that the order of the court referred merely to the production of further proof, as to property and destination on the return voyage; the captor's counsel could not, under these circumstances, go back and open the case anew.

Stothard contended that, as the farther proof disclosed she had gone to Gallipoli on the voyage out, without allowing our cruisers to ascertain she was bound to Gallipoli, and, therefore, under false papers, the property might very fairly be impeached upon evidence which never would have been brought to light, had it not been for this very order of court for farther proof. According to the principles laid down by the court below in the case of *The Rendsborg*,¹ the ship's papers should have disclosed the fact, and the parties have acted *bonâ fide* throughout the transaction, to entitle it to any favorable consideration. It would be therefore inequitable to exclude the captors from the benefit of a disclosure made by the claimants whilst endeavoring to serve their own interests.

BY THE COURT.

SIR W. SCOTT. I conceive you are restricted from entering into this question.

SIR JOHN NICHOLL. What do the facts disclosed prove?

Stothard. The further proof contains extracts from the logs, which prove that the actual destination outward was not disclosed in the ship's papers.

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* *Dallas*. All this has been already the subject of in- [*135] vestigation. On the former hearing it was attempted to show there was such a trading at these ports as brought this vessel within the meaning of the order alluded to. The nature and spirit of the order was then argued, and every part of the case discussed at considerable length. The court determined upon the whole of the facts, and arguments advanced, and directed further proof to those points alone which appeared to require elucidation, namely, the proof of property, and the asserted destination back to Copenhagen. The farther proof now before the court can only be referred to in explanation of these topics.

JUDGMENT.

SIR WILLIAM SCOTT. You cannot now, after the court has heard counsel at length, when this subject should have been regularly brought before the court in the first instance, be permitted to impeach the vessel upon a new ground. The direction for farther proof is specific, and the court will act in conformity thereto. You are not at liberty to open the case again, but must confine your objections to those points which the order of the court has already pointed out as the proper subjects of investigation.

Application refused.

APPENDIX.

ORDERS, NOTIFICATIONS, INSTRUCTIONS, &c.

WHEREAS the Marquis Wellesley, one of his Majesty's principal secretaries of state, hath, in his letter of the 12th instant, signified to us the king's pleasure, that we do give the necessary orders to the officers employed in the blockade of the coast and ports of Spain, from Gijon to the French territory. that they permit, notwithstanding the said blockade, Spanish or neutral vessels laden with cargoes the produce of Spain only, to sail from any port included in the limits of the said blockade, subject, nevertheless, (as to the ports with which they trade,) to the restrictions of his Majesty's order in council of the 26th April, 1809, and of the 7th January, 1807. We do, in pursuance of his Majesty's pleasure, signified to us above mentioned, hereby require and direct your lordship to give the necessary orders to the respective captains, commanders, and commanding officers of his Majesty's ships and vessels under your command accordingly. (Signed)

J. BULLER.
W. DOMET.
R. MOORSON.

To Admiral the Right Hon. Lord Gambier, &c., &c., &c.

- ORDER. February 8, 1811, containing order 20th June, 1810, prohibiting the exportation of iron, hemp, and other ship stores.
- ORDER. February 8, 1811, containing order 16th May, 1810, prohibiting exportation of gunpowder, arms, &c.
- ORDER. February 8, containing order June 20th, 1810, regulating importation of hides, skins, horns, tallow, &c.

At the Court at Carlton House, the 28th February, 1811; present, his Royal Highness the Prince Regent in Council.

WHEREAS vessels under divers flags have proceeded under his Majesty's license from ports of the United Kingdom for Gottenburgh, and certain ports and places in the Baltic, where, owing to circumstances which have intervened, they may not be able to deliver cargo.

* And, whereas, it is expedient to enable the said ships to return [* 2] with their cargoes to the ports of the United Kingdom, it is hereby ordered by his Royal Highness the Prince Regent, in the name and on the behalf of his Majesty, and by and with the advice of his Majesty's privy council, that all ships as aforesaid, which shall put themselves under the convoy of his Majesty's ship Pandora, or of any other of his Majesty's ships which may receive instructions to convoy the same to the ports of the United Kingdom, shall be permitted to return to the said ports, and to receive their freight, and to depart, without molestation, to a port not blockaded, after the delivery of their cargo.

And the right honorable the lords commissioners of his Majesty's treasury, his Majesty's principal secretaries of state, the Lords Commissioners of the Admiralty, and the judge of the High Court of Admiralty, and the judges of the courts of Vice-Admiralty, are to take the necessary measures herein as to them shall respectively appertain.

(Signed)

W. FAWKENER.

By the Commissioners for executing the Office of Lord High Admiral of the United Kingdom of Great Britain and Ireland, &c.

MR. FAWKENER having, by his letter to our secretary of the 25th instant, represented to us, by direction of the lords of his Majesty's most honorable privy council, that it had been deemed expedient to make an alteration in the terms of the licenses permitting vessels to trade to and from this kingdom, so far as relates to the character of such vessels and the flag under which they shall be allowed to sail; but that the lords of the council are of opinion that it will be expedient that general directions should be given that his Majesty's ships and privateers do not molest vessels furnished with the former licenses, provided the same shall be dated previous to the 20th of last month, although such vessels may belong to persons or places excepted in the new form of license, and provided also that the terms and conditions of such licenses shall have been duly complied with. We send you herewith a printed copy of Mr. Fawkeners said letter, and also of the form of license therein referred to, and do hereby require and direct you to cause all persons who already have, or may hereafter take out, from the High Court of *Ad- [* 3]

miralty, letters of marque, to be furnished with copies thereof for their information and guidance.

Given under our hands the 2d day of March, 1811.

R. BICKERTON.
JAS. BULLER.
W. DOMETT.

To the Right Honorable Sir William Scott, judge of the
High Court of Admiralty.

By command of their lordships,
JOHN BARROW.

Council Office, Whitehall, 25th February, 1811.

SIR,—It having become necessary, in consequence of the recent annexation to France of Holland, of the Hans Towns, and of certain other towns and territories, that an alteration should be made in the terms of the licenses, permitting vessels to trade to and from this kingdom, so far as relates to the character of such vessels, and the flag under which they shall be allowed to sail; I am directed by the lords of his Majesty's most honorable privy council, to transmit to you for the information of the Lords Commissioners of the Admiralty, the inclosed form of license so altered; their lordships will observe, that instead of the words heretofore used, namely, "a vessel bearing any flag except the French," the following exception has been introduced, namely, "a vessel sailing under any flag except that of France, or except a vessel belonging to France or the subjects thereof, or belonging to the subjects of any territory, town, or place annexed to and forming a part of France." This new form of license, therefore, will not protect a vessel bearing the French flag, or belonging to France, or to any of the territories, towns, or places, which have been annexed to France; but in consideration of the number of vessels belonging to those territories or places, or sailing under their respective flags, which have already commenced voyages under the former licenses, and which in consequence of this alteration might now be liable to detention; the lords of the council are of opinion that it will be expedient that general directions should be given by the Lords Commissioners of the Admiralty to the commanders of his Majesty's ships of war and privateers not to molest vessels furnished with the former licenses, provided such licenses shall be dated previous to the 20th of this instant February, (the day on which it was [* 4] judged necessary to adopt the alteration above alluded to,) * although such vessels may belong to persons or places excepted in the new form of license; and provided also that the terms and conditions of such licenses shall have been duly complied with.

I am to add, that the alterations contained in the form of license herewith

APPENDIX.

v

transmitted, will be introduced into all licenses where the name of the vessel is not inserted in the body of the license.

I am, sir,
Your most obedient humble servant,
W. FAWKENER.

J. W. Crocker, Esq.

*At the Council Chamber, Whitehall, the of present,
the Lords of his Majesty's most Honorable Privy Council.*

WHEREAS there was this day read at the board the humble petition of
It is ordered in council,
that a license be granted to the petitioner for permitting

bearing any flag except that of France, or except a vessel belonging to France, or to the subjects thereof, or belonging to the subjects of any territory, town, or place annexed to and forming a part of France, to import direct from any port in Norway, Sweden, or Denmark, without the Baltic, not under blockade, to any port of this kingdom, or to sail in ballast from any port north of Tonningen

to any port of Norway, Sweden, or Denmark, without the Baltic, not under blockade, and in either case to import from thence a cargo of grain, (if importable according to the provisions of the corn laws,) and such goods as are permitted by law to be imported (except spirits, lobsters, stock-fish, or fish-oil) to any port of this kingdom :

the master to be permitted to receive his freight, and depart with his crew and vessel to any port not blockaded,

notwithstanding all the documents which accompany the ship and cargo may represent the same to be destined to any other neutral or hostile port, and to whomsoever such property * may appear to belong ; upon [* 5] condition that the name and tonnage of the vessel, name of the master, and time of her clearance from her port of lading, shall be indorsed on the said license, and that if the cargo be destined for Ireland, the vessel shall sail north about ; but if any part of the import cargo of the said vessel consist of naval stores, and be destined for any port of this kingdom lying to the south of the port of Hull, the vessel shall, unless under the protection of convoy, stop at Dundee or Leith, and there obtain a fresh clearance for the port of her destination ; and upon further condition, that the said vessel shall not sail from Dundee or Leith without convoy, and shall proceed with such convoy, and not desert the same, till her arrival at the port of destination, or

as long as such convoy shall be instructed to protect her. Such license to remain in force for four months from the date hereof. Provided always, that at the expiration of the said period, or sooner, if the voyage be completed, the original license shall be deposited, according to the place of importation, with the commissioners of his Majesty's customs at the port of London, or with the collector of the customs at the outports, to be by such collector transmitted to the commissioners for their directions thereon; and that no person shall take any benefit under the said license for the purpose of admitting to entry any ship or cargo, in any manner to which they would not otherwise be entitled before the said license shall have been so deposited, and the order of the said commissioners shall have been had thereon. And the right honorable Richard Ryder, one of his Majesty's principal secretaries of state, is hereby specially authorized to grant such license, in case he shall see no objection thereto, annexing to such license the duplicate of this order herewith sent for that purpose.

ORDER. March 28, containing the order, May 16, 1810, for supplying the colonies in North America and the East Indies, with a form of license.

ORDER. March 28, continuing the order, April 10th, 1810, prohibiting the exportation and regulating the importation of corn and provisions.

[* 6] * In the name and on behalf of his Majesty.
GEORGE P. R.

Instructions to the Commanders of his Majesty's ships of war and privateers

Given at his Majesty's Court at Carleton House,
the 13th day of April, 1811, in the fifty-first
year of his Majesty's reign.

Our will and pleasure is, that his Majesty's instructions of the 4th February, 1807, whereby the importation of cargoes, consisting of the articles therein after enumerated, coming to any port of the United Kingdom (provided they should not be coming from any port in a state of strict and rigorous blockade was allowed, shall be henceforth revoked and discharged.

By the command of his Royal Highness the Prince Regent,
in the name and on the behalf of his Majesty.

(Signed)

R. RYDER.

- ORDER. July 19th, continuing order Feb. 8th, prohibiting exportation of ship's stores, &c.
- ORDER. July 19th, continuing order Feb. 8th, prohibiting exportation of gunpowder, arms, &c.
- ORDER. July 19th, continuing order Feb. 8th, regulating the importation of hides, skins, &c.

At the Court at York House, the 6th of September, 1811; present, his Royal Highness the Prince Regent in Council.

WHEREAS by an act made and passed in the forty-sixth year of his Majesty's reign, entitled "An Act for authorizing his Majesty in Council to allow, during the present War and for six months after the Ratification of a definitive Treaty of Peace, the Importation and Exportation of certain Goods and Commodities in neutral Ships into and from his Majesty's Territories in the West Indies and Continent of South America;" it is enacted, that from and after the passing of the said act, it shall and may * be lawful for his Majesty, his [* 7] heirs and successors, by and with the advice of his and their privy council, to permit or to authorize the governors of the said islands and territories, in such manner and under such restrictions as to his Majesty, by and with the advice of his privy council, shall seem fit, to permit, when the necessity of the case shall appear to his Majesty, with the advice of his privy council, to require it, from time to time, during the present war and for six months after the ratification of a definitive treaty of peace, the importation into and exportation from any island in the West Indies, (in which description the Bahama islands and the Bermuda or Somer islands are included,) or any lands or territories on the continent of South America to his Majesty belonging, of any such articles, goods, and commodities as shall be mentioned in such orders of his Majesty in council, in any ships or vessels belonging to the subjects of any state in amity with his Majesty, in such manner as his Majesty, his heirs and successors, by and with the advice aforesaid, shall direct; whereupon certain orders of council were made on the twelfth day of April one thousand eight hundred and nine, the sixteenth day of August, one thousand eight hundred and nine, the tenth day of January, one thousand eight hundred and ten, and the seventh day of February, one thousand eight hundred and ten; which orders were made to continue in force for a limited time: And whereas it appears at present to be necessary to permit for a further limited time, subject to be sooner terminated, varied, or altered, as is hereinafter provided, the importation into and exportation from the islands and territories of his Majesty in the West Indies, (including the Bahama islands and the Bermuda or Somer islands,) and

the lands and territories on the continent of South America to his Majesty belonging, of certain articles, goods, and commodities hereinafter mentioned, in ships or vessels belonging to the subjects of any state in amity with his Majesty: his Royal Highness the Prince Regent, in the name and on the behalf of his Majesty, is thereupon pleased, by and with the advice of his Majesty's privy council, to order, and it is hereby ordered, that the said orders of council made on the twelfth day of April, one thousand eight hundred and nine, the sixteenth day of August, one thousand eight hundred and nine, the tenth day of January, one thousand eight hundred and ten, and the seventh day of February, one thousand eight hundred and ten, shall continue and be in force until the thirty-

first day of December, one thousand eight hundred and twelve, (except [* 8] as is hereinafter * excepted with respect to salted, dried, or pickled fish,) and that from and after the first day of December, one thousand eight hundred and eleven, it shall be lawful for the governor or lieutenant-governor of any of his Majesty's islands in the West Indies, (in which description the Bahama islands and the Bermuda or Somer islands are included,) and of any lands or territories on the continent of South America, to his Majesty belonging, to permit until the thirty-first day of December, one thousand eight hundred and twelve, subject to be sooner terminated, varied, or altered, as hereinafter provided, in ships or vessels belonging to the subjects of any state in amity with his Majesty, the importation into the said islands, lands, and territories respectively, of staves and lumber, horses, mules, asses, neat cattle, sheep, hogs, and every other species of live stock, and live provisions, and also of every kind of provisions whatsoever, (beef, pork, and butter excepted, and from and after the first day of July, one thousand eight hundred and twelve, salted, dried, and pickled fish also excepted,) and also the exportation from the said islands, lands, and territories respectively, into which such importation as aforesaid shall be made, of rum and molasses, and of any other goods and commodities whatsoever, except sugar, indigo, cotton, wool, coffee, and cocoa: Provided always, that such articles so to be imported, except staves and lumber, shall be of the growth or produce of the country to which the ship or vessel importing the same shall belong; and that staves and lumber shall be imported from the country to which the ship or vessel importing the same shall belong: Provided also, that such ships or vessels shall duly enter into, report and deliver their respective cargoes, and re-load at such ports only, where regular custom-houses shall have been established.

But it is his Royal Highness's pleasure, nevertheless, and his Royal Highness, in the name and on the behalf of his Majesty, and by and with the advice aforesaid, is further pleased to order, and it is hereby ordered, that nothing hereinbefore contained shall be construed to permit, after the said first day of December, one thousand eight hundred and eleven, the importation of staves, lumber, horses, mules, asses, neat cattle, sheep, hogs, poultry, live stock, live provisions, or any kind of provisions whatsoever as aforesaid, into any of the said islands, lands, or territories, in which there shall not be at the time when such articles shall be brought for importation, the following duties on such articles, being of the growth or produce of the United States of America; namely,

APPENDIX.

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	Sterling Money.
	£ s. d.
* For every quintal of dried or salted cod, or ling fish [* 9] cured or salted	0 2 6
For every barrel of cured or pickled shads, alewives, mackerel or salmon, a proportionate duty.	

	Current Money of Jamaica.
On wheat flour per barrel, not weighing more than one hundred and ninety-six pounds, net weight	0 6 8
On bread or biscuit of wheat flour, or any other grain per barrel, not weighing more than one hundred pounds, net weight,	0 3 4
On bread, for every hundred pounds, made from wheat or any other grain whatever, imported in bags or other packages than barrels, weighing as aforesaid	0 3 4
On flour or meal made from rye, pease, beans, Indian corn, or other grain than wheat, per barrel, not weighing more than one hundred and ninety-six pounds	0 3 4
On pease, beans, rye, Indian corn, callivances, or other grain, per bushel	0 0 10
On rice, for every one hundred pounds net weight	0 3 4
And so in proportion for a less or larger quantity.	
On shingles, called Boston chips, not more than twelve inches in length, per thousand	0 3 4
On shingles, being more than twelve inches in length, per thou- sand	0 6 8
For every twelve hundred (commonly called one thousand) of red oak staves	1 0 0
For every twelve hundred (commonly called one thousand) of white oak staves, and for every one thousand pieces of heading	0 15 0
For every one thousand feet of white or yellow pine lumber of all descriptions	0 10 0
For every thousand feet of pitch pine lumber	0 15 0
For all other kinds of wood or timber not before enumerated	0 15 0
For every one thousand wood hoops	0 5 0
And in proportion for a less or larger quantity of all and every the articles enumerated.	
Horses, neat cattle, or other live stock, for every one hundred pounds of the value thereof, at the port or place of importa- tion	10 0 0

* And his Royal Highness, in the name and on the behalf of his [* 10] Majesty, and by and with the advice aforesaid, is further pleased to order, and it is hereby ordered, that notwithstanding any thing hereinbefore contained, the said permission and authority to import and export shall cease and determine, or be varied and altered before the expiration of the above-mentioned period of the thirty-first day of December one thousand eight hundred and twelve, at the expiration of six months after the notification in the London Gazette of any order of his Majesty, or of his Royal Highness the

Prince Regent, in the name and on the behalf of his Majesty, by and with the advice of his Majesty's privy council, for revoking, varying, or altering such permission and authority, or shall cease and determine at the expiration of six months after the ratification of definitive treaty of peace.

CHETWIND.

At the Court at York House, the 6th day of September, 1811; present, his Royal Highness the Prince Regent in Council.

WHEREAS it is expedient further to encourage the trade from Heligoland to and from the ports and places situated between Norden and the river Eyder both inclusive, his Royal Highness the Prince Regent, in the name and on the behalf of his Majesty, and by and with the advice of his Majesty's privy council, is pleased to order, and it is hereby ordered, that licenses be granted by the governor or lieutenant-governor of Heligoland, but in his Majesty's name, to such person or persons as the said governor or lieutenant-governor shall think fit, allowing such person or persons to export from Heligoland direct to any port or place from Norden to the Eyder, both inclusive, any articles which shall be certified by the certifying officer at Heligoland to have been legally imported into that island from some port of the United Kingdom (not being naval or military stores) in any vessels bearing any flag, except the French; and also to import into the said island in any such vessels from any ports or places within the limits above described, cargoes of grain, corn, meal, and flour, rice, madder, and madder roots, smalts, argol, galls, cream of tartar, safflower, saffron, verdigrease, olive oil, fruit, ashes, juniper berries, organized thrown and raw silk, (not being the production of the East Indies or China.)

[* 11] quicksilver, bullion * coined and uncoined, goat, kid, and lamb skins, rags, oak bark, flax, seeds, oil of turpentine, pitch, hemp, timber, fir, oak, oak plank, masts and spars, butter and cheese, flaxen and linen yarn, drugs and hides; linens, German wool, stag horns, antimony, zaffers, French cambrics and lawns, hams, cantharides, angelica roots, terras, tobacco in legal packages, and no other articles whatever, to whomsoever the said articles may appear to belong, such articles to be specified in the bill of lading of such vessel, subject, however, to such further regulations and restrictions, with respect to all or any of such articles so to be exported or imported, as to the said governor or lieutenant-governor of the island for the time being respectively shall from time to time seem fit and expedient.

And it is further ordered, that the commanders of his Majesty's ships of war and privateers, and all others whom it may concern, shall suffer every such vessel, sailing conformably to the permission given by this order, and having any such license as aforesaid, to pass and repass direct between Heligoland and the ports between Norden and the river Eyder, both inclusive, in such manner

and under such terms, regulations, and restrictions as shall be expressed in the said license.

And it is further ordered, that in case any vessel so sailing as aforesaid, for which any such license as aforesaid shall have been granted, and which shall be proceeding direct upon her said voyage, shall be detained and brought in for legal adjudication, such vessel with her cargo shall be forthwith released by the Court of Admiralty, in which proceedings shall be commenced, upon proof being made that the parties had duly conformed to the terms, regulations, and restrictions of the said license ; the proof of such conformity to be upon the person or persons claiming the benefit of this order or obtaining or using such license, or claiming the benefit thereof.

And the right honorable the lord commissioners of his Majesty's treasury, his Majesty's principal secretaries of state, the Lords Commissioners of the Admiralty, and the judge of the High Court of Admiralty, and the judges of the Courts of Vice-Admiralty, are to take the necessary measures herein as to them shall respectively appertain.

(Signed)

CHETWYND.

* *At the Court at Whitehall, the 1st October, 1811 ; present, his [* 12]
Royal Highness the Prince Regent in Council.*

WHEREAS it is expedient that the trade and commerce to and from the Cape of Good Hope, and the territories and dependencies thereof, which is at present carried on not only by British ships and vessels belonging to the subjects of any country or state in amity with his Majesty, should from the day hereinafter mentioned, be carried on in British ships and vessels only, and the permission that has been granted by an order of his Majesty in council of the 12th April, 1809, for foreign ships and vessels to carry on the said trade and commerce, should cease and determine ; his Royal Highness the Prince Regent, in the name and on the behalf of his Majesty, and by and with the advice of his Majesty's privy council, is pleased to order, and it is hereby ordered, that every thing in the said order contained, which permits ships and vessels belonging to the subjects of any country or state in amity with his Majesty, to enter into the ports of the said settlement of the Cape of Good Hope, and of the territories and dependencies thereof, and to carry on trade and traffic with the inhabitants of the said settlement and of the territories and dependencies thereof, and to import and export to and from the ports of the said settlement, and of the territories and dependencies thereof, any goods, wares, or merchandise whatsoever, shall be and the same is hereby, from and after the 12th day of April, 1812, revoked and determined.

Provided, however, that nothing in this order contained shall extend or shall be construed to extend to prevent the entry into the ports of the said settlement of the Cape of Good Hope, and of the territories and dependencies thereof, of

any ships or vessels belonging to the subjects of any country or state in amity with his Majesty, which may resort thither for repairs or refreshment, in which case a part of the cargoes of such ships and vessels may be permitted to be disposed of, for the purpose of defraying the expense of such repairs or refreshment ; nor to prevent the entry into the said ports of any vessels belonging to the subjects of any country or state in amity with his Majesty, laden with provisions, and which shall be furnished with a license from the governor of the Cape of Good Hope, permitting such importation, which license he is hereby empowered to grant ; and the right honorable the lords commissioners of his Majesty's treasury, and the Lords Commissioners of the Admiralty, are to give the necessary directions herein, as to them may respectively appertain.

CHETWYND.

[* 13] * ORDER. Jan. 6th, 1812, continuing order July 19th, 1811, prohibiting exportation of ships' stores, &c.

ORDER. Jan. 6th, continuing order July 19th, prohibiting the exportation of gunpowder, arms, &c.

FOREIGN OFFICE, 21st January, 1812.

His Royal Highness the Prince Regent, acting in the name and on the behalf of his Majesty, has been pleased to cause it to be signified, by the Marquis Wellesley, his Majesty's principal secretary of state for foreign affairs, to the ministers of friendly powers, residing at this court, that the necessary measures have been taken by the command of his Royal Highness, acting in the name and on the behalf of his Majesty, for the blockade of the islands of Corfu, Fano, and Paxo ; and of Perga, on the coast of Albania ; and that, from this time, all the measures authorized by the law of nations will be adopted and executed, with respect to all vessels which may attempt to violate the said blockade.

ORDER. Jan 24th, continuing order July 19th, granting permission to import hides, skins, &c., in neutral ships, &c.

At the Court at Carlton House, the 4th day of March, 1812; present, his Royal Highness the Prince Regent in Council.

WHEREAS it has been represented to his Royal Highness the Prince Regent, that divers commercial houses in London and other parts of the United Kingdom, connected in trade with Spain, have been accustomed to have partners in their said houses resident in Spain, and that it becomes more necessary in the present state of that country, that such partners should continue to reside there for the protection of the interests of their said houses, and for facilitating the commercial intercourse between the two countries : And whereas it may happen that places wherein such persons may be resident may have fallen, or may fall, under the possession and usurpation of France, and that in consequence thereof doubts may arise upon the national character of the said persons, to the prejudice of them and of their partners and houses of trade in any part of the United Kingdom :

His Royal Highness the Prince Regent, acting in the name and on the behalf of his Majesty, is pleased, by and with the advice of * his [* 14] Majesty's privy council, to declare, and it is hereby declared, that all persons, natives of Spain, being partners in any house of trade in any part of the United Kingdom, and resident in Spain, or in any island in Europe dependent thereon, for the purpose of transacting the business of their respective houses, shall be considered as stranger friends, and shall in no case be treated as alien enemies ; and that persons, being British subjects, and resident in Spain, or in any island in Europe dependent thereon, for the purpose of transacting the business of any house of trade in which they are partners in any part of the United Kingdom, shall be considered, and are hereby declared to be so resident as aforesaid under his Majesty's license, and without prejudice to their character of British subjects, or to any of the rights or privileges belonging thereto ;

Provided, that the names of all persons claiming the benefit of this order, shall, within six months from the date hereof, or from the time of their going henceforth to reside in Spain, or in any island in Europe dependent thereon, be given in, together with the names of their respective houses of trade in the United Kingdom, and the usual place of their abode in Spain, or in any island as aforesaid dependent thereon, to the clerk of his Majesty's most honorable privy council : And it is further ordered, that this order shall be of no effect for the benefit or protection of any person that shall not duly comply with the said provision.

And the right honorable the lords commissioners of his Majesty's treasury, his Majesty's principal secretaries of state, the Lords Commissioners of the Admiralty, and the judge of the High Court of Admiralty, and the judges of the Courts of Vice-Admiralty, are to take the necessary measures herein as to them may respectively appertain.

CHETWYND.

At the Court at Carlton House, the 20th of March, 1812 ; present, his Royal Highness the Prince Regent in Council.

WHEREAS certain licenses have been granted for the importation of raw or thrown silk from ports of France, restricting the time of such importation to the first day of April next :

[* 15] * And whereas it has been represented, that causes may have arisen which may prevent divers vessels sailing under the protection of the said licenses from arriving in the ports of the United Kingdom, on or before the said first day of April :

His Royal Highness the Prince Regent, in the name and on the behalf of his Majesty, and by and with the advice of his Majesty's privy council, is pleased to order, and it is hereby ordered, that ships and goods sailing under the protection of the said license shall be allowed to pass without molestation on account of the expiration of the times specified in the said licenses ; provided the said vessels shall have cleared out from the ports and places of shipment prior to the first of April aforesaid.

And the right honorable the lords commissioners of his Majesty's treasury, his Majesty's principal secretaries of state, the Lords Commissioners of the Admiralty, and the judge of the High Court of Admiralty, and judges of the Courts of Vice-Admiralty, are to take the necessary measures herein as to them shall respectively appertain.

CHETWIND

ORDER. March 20th, continuing order, March 28th, 1811, regulating importation of provisions.

At the Court at Carlton House, the 8th day of April, 1812 ; present, his Royal Highness the Prince Regent in Council.

WHEREAS by an order of his Royal Highness the Prince Regent in council bearing date the 6th of September last, his Royal Highness was pleased, in the name and on the behalf of his Majesty, to authorize and empower the governor or lieutenant-governor of Heligoland to grant licenses in his Majesty's name, to such persons as the said governor or lieutenant-governor should think fit, allowing such person or persons to export from Heligoland, direct to any port or place from Nordon to the Eyder, both inclusive, any articles which shall be certified by the certifying officer at Heligoland to have been legally imported into that island from some port of the United Kingdom (not being naval or military stores,) and to import into the said island certain articles specified in the said above-recited order.

* And whereas it is expedient that the powers vested in the said [* 16] governor and lieutenant-governor of Heligoland should be extended so far as respects the ports and places to and from which the articles therein specified shall be permitted to be exported or imported ; his Royal Highness the Prince Regent, in the name and on the behalf of his Majesty, and by and with the advice of his Majesty's privy council, is pleased to order, and it is hereby ordered, that licenses be granted by the governor or lieutenant-governor of Heligoland, but in his Majesty's name, to such person or persons as the said governor or lieutenant-governor shall think fit, allowing such person or persons to export from Heligoland, direct to any port or place from Norden to Horn Point on the coast of Jutland, both inclusive, and to import from any port or place, situate within the said limits, the several articles specified in the said above-recited order of the Prince Regent in council of 6th September last, in vessels of the description therein stated, subject to the rules, regulations, and restrictions therein contained, and subject to such further regulations and restrictions, with respect to all or any of such articles so to be exported or imported, as the said governor or lieutenant-governor of the island for the time being respectively shall, from time to time, see fit and expedient.

And it is further ordered, that the commanders of his Majesty's ships of war and privateers, and all others whom it may concern, shall suffer every such vessel sailing conformably to the permission given by this order, and having any such license as aforesaid, to pass and repass direct between Heligoland and the ports between Norden and Horn Point, both inclusive, in such manner and under such terms, regulations, and restrictions, as shall be expressed in the said license ; and it is further ordered, that in case any vessel so sailing as aforesaid, for which any such license as aforesaid shall have been granted, and which shall be proceeding direct upon her said voyage, shall be detained and brought in for legal adjudication, such vessel, with her cargo, shall be forthwith released by the Court of Admiralty, in which proceedings shall be commenced, upon proof being made that the parties had duly conformed to the terms, regulations, and restrictions of the said license : the proof of such conformity to be upon the person or persons claiming the benefit of this order, or obtaining or using such license, or claiming the benefit thereof.

And the right honorable the lords commissioners of his Majesty's treasury, his Majesty's principal secretaries of state, * the Lords Com- [* 17] missioners of the Admiralty, and the judge of the High Court of Admiralty, and the judges of the Courts of Vice-Admiralty, are to take the necessary measures herein as to them shall respectively appertain.

CHETWYND.

At the Court at Carlton House, the 21st of April, 1812 ; present, his Royal Highness the Prince Regent in Council.

WHEREAS the government of France has, by an official report, communicated by its minister for foreign affairs to the conservative senate, on the 10th

of March last, removed all doubts as to the perseverance of that government in the assertion of principles, and in the maintenance of a system, not more hostile to the maritime rights and commercial interests of the British empire, than inconsistent with the rights and independence of neutral nations, and has thereby plainly developed the inordinate pretensions which that system, as promulgated in the decrees of Berlin and Milan, was from the first designed to enforce :

And whereas his Majesty has invariably professed his readiness to revoke the orders in council adopted thereupon, as soon as the said decrees of the enemy should be formally and unconditionally repealed, and the commerce of neutral nations restored to its accustomed course :

His Royal Highness the Prince Regent (anxious to give the most decisive proof of his Royal Highness's disposition to perform the engagements of his Majesty's government) is pleased, in the name and on the behalf of his Majesty, and by and with the advice of his Majesty's privy council, to order and declare, and it is hereby ordered and declared, that if, at any time hereafter, the Berlin and Milan decrees shall, by some authentic act of the French government, publicly promulgated, be absolutely and unconditionally repealed, then, and from thenceforth, the order in council of the seventh day of January one thousand eight hundred and seven, and the order in council of the twenty-sixth day of April one thousand eight hundred and nine, shall, without any further order, be, and the same are hereby, declared from thenceforth to be

wholly and absolutely revoked : and further, that the full benefit of [* 18] this order shall be extended to any ship or * cargo captured subsequent to such authentic act of repeal of the French decrees, although antecedent to such repeal such ship or vessel shall have commenced and shall be in the prosecution of a voyage which, under the said orders in council, or one of them, would have subjected her to capture and condemnation ; and the claimant of any ship or cargo which shall be captured or brought to adjudication, on account of any alleged breach of either of the said orders in council, at any time subsequent to such authentic act of repeal by the French government, shall, without any further order or declaration on the part of his Majesty's government on this subject, be at liberty to give in evidence in the High Court of Admiralty, or any Court of Vice-Admiralty before which such ship or cargo shall be brought for adjudication, that such repeal by the French government had been, by such authentic act, promulgated prior to such capture ; and upon proof thereof, the voyage shall be deemed and taken to have been as lawful as if the said orders in council had never been made ; saving nevertheless to the captors such protection and indemnity as they may be equitably entitled to in the judgment of the said court, by reason of their ignorance, or uncertainty as to the repeal of the French decrees, or of the recognition of such repeal by his Majesty's government at the time of such capture.

His Royal Highness, however, deems it proper to declare, that should the repeal of the French decrees, thus anticipated and provided for, prove afterwards to have been illusory on the part of the enemy ; and should the restrictions thereof be still practically enforced, or revived by the enemy ; Great Britain will be compelled, however reluctantly, after reasonable notice, to have

recourse to such measures of retaliation as may then appear to be just and necessary.

And the right honorable the Lords commissioners of his Majesty's treasury, his Majesty's principal secretaries of state, the Lords Commissioners of the Admiralty, and the judge of the High Court of Admiralty, and the judges of the Courts of Vice-Admiralty, are to take the necessary measures herein as to them shall respectively appertain.

CHETWYND.

* DECLARATION.

[* 19]

The government of France having by an official report, communicated by its minister for foreign affairs to the conservative senate, on the 10th day of March last, removed all doubts as to the perseverance of that government in the assertion of principles, and in the maintenance of a system, not more hostile to the maritime rights and commercial interests of the British empire, than inconsistent with the rights and independence of neutral nations — and having thereby plainly developed the inordinate pretensions which that system, as promulgated in the decrees of Berlin and Milan, was from the first designed to enforce ; his Royal Highness the Prince Regent, acting in the name and on the behalf of his Majesty, deems it proper, upon this formal and authentic republication of the principles of those decrees, thus publicly to declare his Royal Highness's determination still firmly to resist the introduction and establishment of this arbitrary code, which the government of France openly avows its purpose to impose by force upon the world — as the law of nations.

From the time that the progressive injustice and violence of the French government made it impossible for his Majesty any longer to restrain the exercise of the rights of war within their ordinary limits, without submitting to consequences not less ruinous to the commerce of his dominions than derogatory to the rights of his crown, his Majesty has endeavored, by a restricted and moderate use of those rights of retaliation, which the Berlin and Milan decrees necessarily called into action, to reconcile neutral states to those measures, which the conduct of the enemy had rendered unavoidable ; and which his Majesty has at all times professed his readiness to revoke, so soon as the decrees of the enemy, which gave occasion to them, should be formally and unconditionally repealed ; and the commerce of neutral nations be restored to its accustomed course.

At a subsequent period of the war, his Majesty availing himself of the then situation of Europe, without abandoning the principle and object of the orders in council of November, 1807, was induced so to limit their operation, as materially to alleviate the restrictions thereby imposed upon neutral commerce.

The order in council of April, 1809, was substituted in the room of those of November, 1807, and the retaliatory system of Great Britain acted [* 20] no longer on every country, in which the * aggressive measures of the enemy were in force ; but was confined in its operation to France, and to the countries upon which the French yoke was most strictly imposed ; and which had become virtually a part of the dominions of France.

The United States of America remained nevertheless dissatisfied ; and the dissatisfaction has been greatly increased by an artifice too successfully employed on the part of the enemy, who has pretended, that the decrees of Berlin and Milan were repealed, although the decree effecting such repeal has never been promulgated ; although the notification of such pretended repeal described it to be dependent on conditions, in which the enemy knew Great Britain could never acquiesce ; and although abundant evidence has since appeared of their subsequent execution.

But the enemy has at length laid aside all dissimulation ; he now publicly and solemnly declares, not only that those decrees still continue in force, but that they shall be rigidly executed, until Great Britain shall comply with conditional conditions, equally extravagant ; and he further announces the penalty of those decrees to be in full force against all nations which shall suffer their flag to be, as it is termed in this new code, "denationalized."

In addition to the disavowal of the blockade of May, 1806, and of the principles on which that blockade was established, and in addition to the repeal of the British orders in council — he demands an admission of the principles, that the goods of an enemy, carried under a neutral flag, shall be treated as neutral ; — that neutral property, under the flag of an enemy, shall be treated as hostile ; — that arms and warlike stores alone (to the exclusion of shipboard and other articles of naval equipment) shall be regarded as contraband of war — and that no ports shall be considered as lawfully blockaded, except such as are invested and besieged, in the presumption of their being taken, [*en prévision d' être pris,*] and into which a merchant ship cannot enter without danger.

By these and other demands, the enemy in fact requires, that Great Britain and all civilized nations, shall renounce, at his arbitrary pleasure, the established and indisputable rights of maritime war ; that Great Britain, in particular, forego the advantages of her naval superiority, and allow the commerce of property, as well as the produce and manufactures of France, and her colonies, to pass the ocean in security ; whilst the subjects of Great Britain [* 21] are to be, in effect, proscribed from all commercial intercourse with other nations ; and the produce and manufactures of these realms are to be excluded from every country in the world, to which arms or the influence of the enemy can extend.

Such are the demands to which the British government is summoned to submit, to the abandonment of its most ancient, essential, and undoubted maritime rights. Such is the code by which France hopes, under the cover of a neutral flag, to render her commerce unassailable by sea ; whilst she proceeds to invade or to incorporate with her own dominions all states that hesitate to sacrifice their national interest at her command ; and in abdication of their

rights, to adopt a code, by which they are required to exclude, under the mask of municipal regulation, whatever is British from their dominions.

The pretext for these extravagant demands is, that some of these principles were adopted by voluntary compact in the treaty of Utrecht ; as if a treaty once existing between two particular countries, founded on special and reciprocal considerations, binding only on the contracting parties, and which, in the last treaty of peace between the same powers, had not been revived, were to be regarded as declaratory of the public law of nations.

• It is needless for his Royal Highness to demonstrate the injustice of such pretensions. He might otherwise appeal to the practice of France herself, in this and in former wars ; and to her own established codes of maritime law : it is sufficient that these new demands of the enemy form a wide departure from those conditions on which the alleged repeal of the French decrees was accepted by America ; and upon which alone, erroneously assuming that repeal to be complete, America has claimed a revocation of the British orders in council.

His Royal Highness, upon a review of all these circumstances, feels persuaded that so soon as this formal declaration, by the government of France, of its unabated adherence to the principles and provisions of the Berlin and Milan decrees, shall be made known in America, the government of the United States, actuated not less by a sense of justice to Great Britain, than by what is due to its own dignity, will be disposed to recall those measures of hostile exclusion, which, under a misconception of the real views and conduct of the French government, America has exclusively applied to the commerce and ships of war of Great Britain.

* To accelerate a result so advantageous to the true interests of both [* 22] countries, and so conducive to the reëstablishment of perfect friendship between them ; and to give a decisive proof of his Royal Highness's disposition to perform the engagements of his Majesty's government, by revoking the orders in council, whenever the French decrees shall be actually and unconditionally repealed ; his Royal Highness the Prince Regent has been this day pleased, in the name and on the behalf of his Majesty, and by and with the advice of his Majesty's privy council, to order and declare :

“ That if, at any time hereafter, the Berlin and Milan decrees shall, by some authentic act of the French government, publicly promulgated, be absolutely and unconditionally repealed, then, and from thenceforth, the order in council of the seventh day of January, one thousand eight hundred and seven, and the order in council of the twenty-sixth day of April, one thousand eight hundred and nine, shall, without any further order, be, and the same are hereby, declared from thenceforth to be wholly and absolutely revoked : and further, that the full benefit of this order shall be extended to any ship or cargo captured subsequent to such authentic act of repeal of the French decrees, although antecedent to such repeal such ship or vessel shall have commenced and shall be in the prosecution of a voyage which, under the said orders in council, or one of them, would have subjected her to capture and condemnation ; and the claimant of any ship or cargo which shall be captured or brought to adjudication, on account of any alleged breach of either of the said orders in council,

at any time subsequent to such authentic act of repeal by the French government, shall, without any further order or declaration on the part of his Majesty's government on this subject, be at liberty to give in evidence in the High Court of Admiralty, or any Court of Vice-Admiralty before which such ship or cargo shall be brought for adjudication, that such repeal by the French government had been, by such authentic act, promulgated prior to such capture; and upon proof thereof, the voyage shall be deemed and taken to have been as lawful as if the said orders in council had never been made; saving nevertheless to the captors such protection and indemnity as they may be equitably entitled to in the judgment of the said court, by reason of their ignorance, or uncertainty as to the repeal of the French decrees, or of the recognition of such repeal by his Majesty's government at the time of such capture.

[* 23] * "His Royal Highness, however, deems it proper to declare, that should the repeal of the French decrees, thus anticipated and provided for, prove afterwards to have been illusory on the part of the enemy; and should the restrictions thereof be still practically enforced, or revived by the enemy; Great Britain will be compelled, however reluctantly, after reasonable notice, to have recourse to such measures of retaliation as may then appear to be just and necessary."

Westminster, April 21, 1812.

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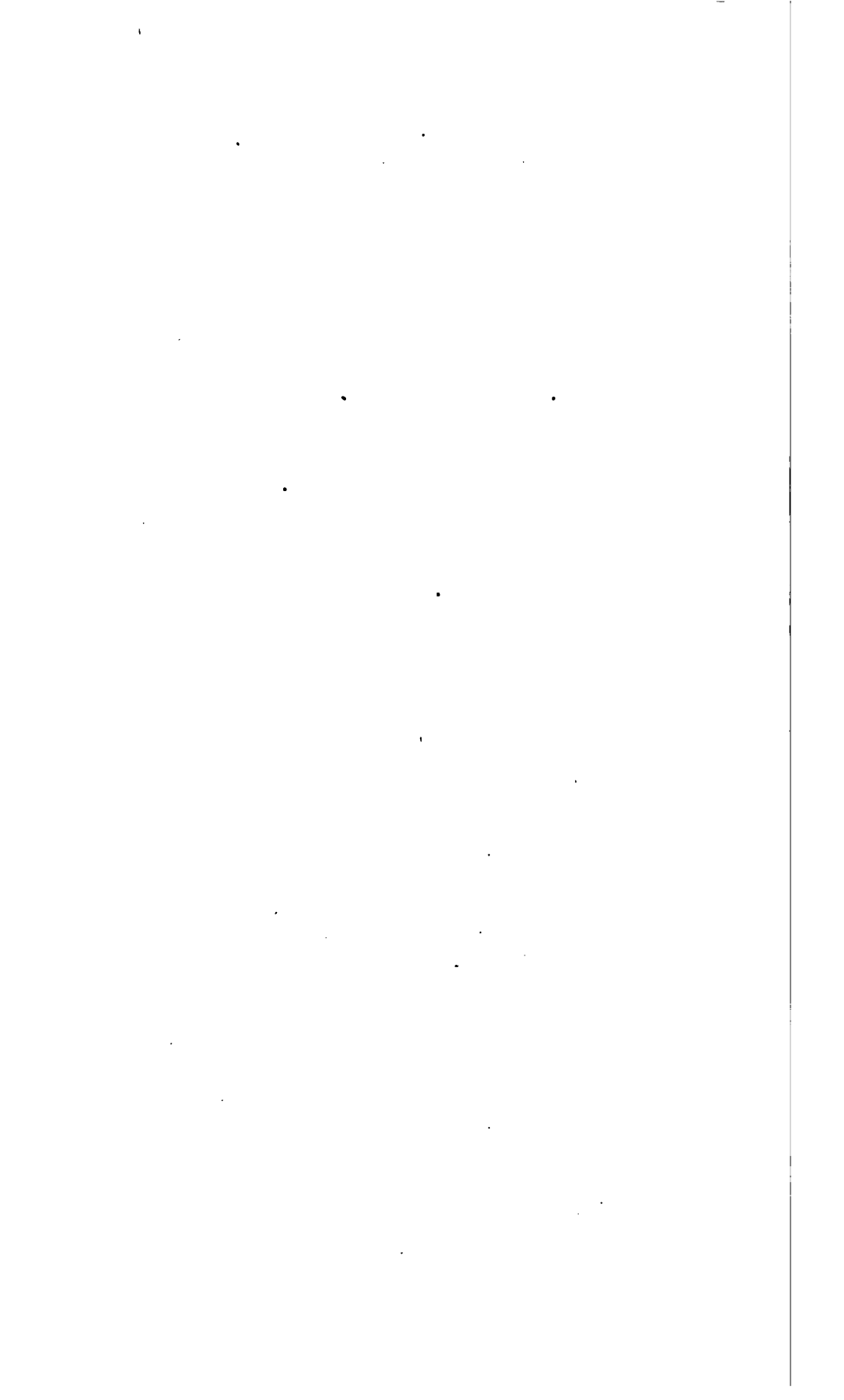
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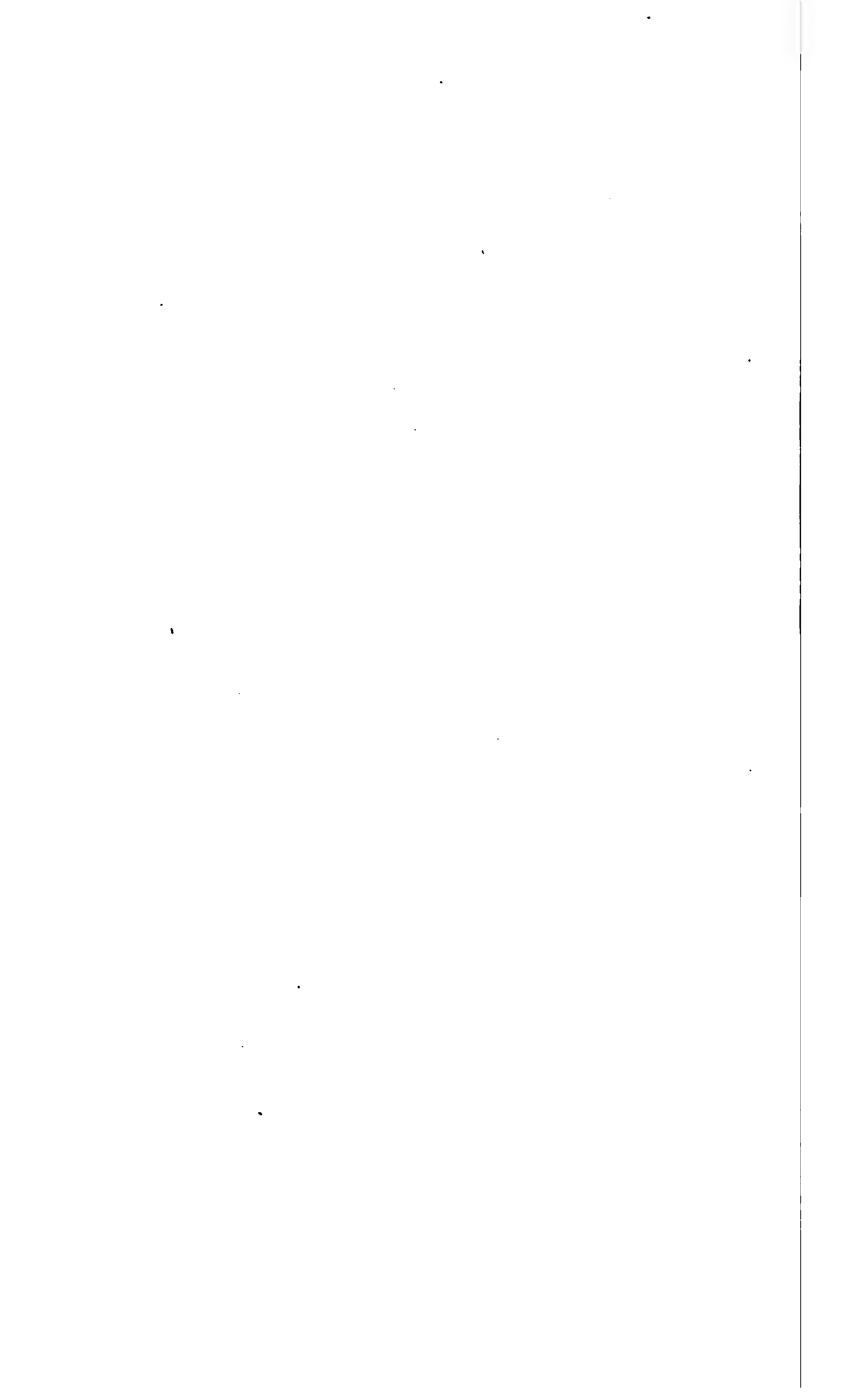
OF

NOTES OF CASES.

Thomas Thornton.

[THE CASES SELECTED ARE THOSE NOT REPORTED IN THE REGULAR REPORTS.]

1841-1842.



REPORTS OF CASES

DETERMINED IN THE

HIGH COURT OF ADMIRALTY.

THE GANGES.

Act on Petition.

June 17, 1841.

Salvage. Services rendered by a vessel sailing in company with another, not entitled to a large compensation.

THIS was an action by the master, owner, officers, and crew of the bark *Medora*, against the bark *Ganges*, her cargo and freight, for a remuneration for salvage services alleged to have been rendered to that vessel on her voyage from India. Both ships left Bombay nearly at the same time, *The Medora* on the 9th, *The Ganges* on the 11th May, 1840, on their voyage to England. The *Ganges* was teak-built, but thirty-six years old, and five of her crew only were Europeans, the remainder being Asiatics. Having, soon after leaving the harbor, (on the 12th,) struck against some fishing stakes, she sprung a leak, but it was not till 25th May that the leak excited any alarm. On the 26th, in consequence of a signal from *The Ganges*, Harrison, the master of *The Medora* (which had fallen in with her on the 21st May,) sent his carpenter on board, and at the request of Steel, the master of *The Ganges*, consented to keep near, lest the leak should increase. Capt. Harrison went on board *The Ganges*, kept up the courage of the crew, and added his advice to the services of his carpenter. On the 30th, Capt. Steel wrote a letter to Capt. Harrison, wherein he stated, as follows: "The *Ganges* still continuing * to make more water, notwithstanding our having such fine [* 88] weather and smooth water, it is the request of myself and officers that you will continue to keep company with us until we reach the Isle of France, or some other port, in safety; considering,

The Ganges. 1 Notes of Cases.

for the sake of the crew, ship, and cargo, and all concerned, in the leaky state The Ganges is now in, it would be wrong to proceed further, but get the ship, as quick as possible, into the nearest port." Capt. Harrison agreed to accompany The Ganges to port Louis, which they reached on the 16th June, and where the vessel was repaired. For this service, and for the deviation of The Medora from her proper route at that season of the year, a claim for salvage was made. The vessel, cargo, (consisting of cotton, gum, and sundries,) and freight, were valued at 16,000*l*. Bail had been taken at 5,000*l*.

Sir J. Dodson, Q. A., and Nicholl, D., for the salvors. Capt. Harrison, at the risk of his own valuable cargo, and to the delay of his voyage, at the request of Capt. Steel, staid by the Ganges, and accompanied her to a place of safety; he is entitled to a considerable reward for the services rendered to this large amount of property.

Addams, D., and Robinson, D., for the mortgagee of the vessel and consignees of the cargo.

JUDGMENT.

DR. LUSHINGTON. That Capt. Steel considered, when he addressed the letter to Capt. Harrison, that the vessel and the property, as well as the lives of those on board, were exposed to considerable risk, I entertain no doubt; he would not otherwise have expressed himself in such terms, for there was no reason why he should have exaggerated the risk. But, on the other hand, it appears to me that there was no immediate danger at that time; though he might think that, if bad weather had come on, the leak, which had continued to gain upon them, notwithstanding fair weather and a smooth sea, might place them in circumstances of great danger. Capt. Harrison agrees to accompany The Ganges to Port Louis, and undoubtedly the leak on the 11th June, had become dangerous, because there were four feet water in the hold, and in the protest it is expressly stated

[* 89] that it was necessary to proceed to the Mauritius for "the safety of the lives on board. It has been said that, when Capt. Steel consulted the masters of The Medora and The Lady East, the only subject of consultation must have been, whether The Ganges should be abandoned or not. I cannot go the full length of this observation, because there are no circumstances to satisfy my mind that there was any immediate intention of abandoning the vessel; they go merely to show that a state of things might occur which would render the abandonment of the ship necessary. During the interval between the 30th May and the 11th June, Capt. Harrison had remained by

the vessel, and a code of signals had been arranged, which shows that a case of considerable urgency might arise, for the last signal is expressly said "to be used in case of imminent danger." All the other assistance rendered is comprised in the general observation, that Capt. Harrison gave his advice and encouraged Capt. Steel in his determination to proceed to the Mauritius, and afforded him the aid of his carpenter and joiner.

Now I am clearly of opinion that some service was rendered by Capt. Harrison, and by the aid of those on board his vessel; the only question is, the extent of the service. That any great labor was undergone by himself or his crew, or that any great risk was incurred by the ship or cargo, cannot be pretended. The principal ground on which it is alleged that there should be a considerable extent of salvage allotted is, that there was a deviation of 500 or 600 miles, and that the great increase of risk to *The Medora* thereby ought to be considered. Now, certainly, when I find some nautical men swearing that it is totally unusual to resort to the Mauritius in such a season of the year, and that it would entail a deviation from the course of six to eight degrees, and other nautical men, with equal experience, swearing the contrary, and that it is little, if at all, out of the way, the Court is placed in some difficulty to know where the truth lies. But this observation is entitled to some weight: "How came it that *The Lady East* should have approached within a short distance of the Mauritius, and that *The Medora*, which touched at the Mauritius, should have arrived at St. Helena before *The Lady East*?" I conceive the case was *this: when the ves- [*90] sels sailed from Bombay, in May, it depended upon the state of the wind and weather, whether their course should be to the Mauritius, or whether that would be much out of the ordinary course; and I cannot help thinking that *The Medora* was not taken any very great distance out of the course proper to be pursued, and she could not have been much delayed if she arrived at St. Helena three days before *The Lady East*.

The value of the property is considerable, but I think the service is not one which ought to receive a high degree of compensation. I consider that it is not quite a service that ought to be rendered gratuitously; but I think that where vessels proceed on the same voyage, leaving port nearly together, and where assistance is rendered by one to the other, without any great deviation from the proper course, the amount of salvage ought not to be very considerable. I think, therefore, that 300*l.* will be quite sufficient for all that was done. I think the vessel and cargo were arrested for a larger amount than is justifiable.

[* 114]

* THE HEART OF OAK.

Motion.

July 13, 1841.

Bottomry. Costs of registrar's report given to the bond-holder.

A bottomry-bond was, on the 24th March last,¹ pronounced valid in part and invalid as to the rest, and it was referred to the registrar and merchants to report on certain items.

The report being now made, a question was raised as to which party should pay the costs of the report. The proctor for the bondholder claimed the costs, as the report was in favor of the whole sum.

The proctor for the present owners alleged that they had [* 115] been compelled to go before * the registrar, as the court had pronounced against some and for other items.

JUDGMENT.

DR. LUSHINGTON. In this case the proceedings were against the vessel, and if you purchased the vessel, you took it with all its responsibilities, and your remedy is against the original vendor. The costs of the report must be allowed.

THE WILSONS.

Motion.

July 13, 1841.

Bottomry. Proceeds of vessel hypothecated, sold under decree of court, in a case of salvage, allowed to be arrested in the registry, at peril of bond-holder.

THE vessel in this case was bound from Italy to St. Petersburg. but wanting repairs at Portsmouth, the master being without funds or credit, advertised for an advance of 300*l.* upon bottomry. No offer was made, but ultimately Messrs. G. and G., of that place, con-

¹ Reported in 1 W. Rob. 204.

sented to advance 264*l.* on a bottomry-bond, bearing maritime interest at 13 per cent. The bond contained a proviso, that, should the brig miscarry or be lost, the money advanced would not be demandable. The brig left Portsmouth on the 28th April, but on the 6th May she was driven, by stress of weather, upon the Long Sand, between Kent and Essex, whence she was got off by H. M.'s ship Boxer, and taken to Ramsgate. Salvage was awarded for the service, by this Court, and, under its decree, the vessel was sold for 1,660*l.*¹ The sum of 1,370*l.* was paid into the registry on the 25th May, as the net proceeds.

Addams, D., now moved for a warrant to arrest the proceeds. The miscarriage, which was to forfeit the money advanced under the bond, must be total. Here the voyage was only intercepted. Whether any part of the maritime interest be payable, is another question.

JUDGMENT.

DR. LUSHINGTON. I shall allow the proceeds to be arrested, but at your peril, and if it should appear that I have not (as I think I have not,) jurisdiction, you will be condemned in the costs.

 THE DYGDEN.
Act on Petition.

July 21, 1841.

Salvage. Claims of salvors (fishermen) pronounced against for erroneous and improper conduct. Persons who assume the character of salvors, when more competent persons are at hand, are entitled to no indulgence.

THE Dygden, a foreign bark, of 420 tons, drawing fifteen feet of water, sailed from Norway 2d of February, with a cargo of timber, * for Gibraltar. On the 4th, having approached the [* 116] English coast, the master mistook the Winterton Light for that on the North Foreland, and was observed from Cromer proceeding along the Norfolk coast, in evident ignorance of the locality, towards the dangerous shoals in the way to the Lynn Deep. The

¹ 1 W. Rob. 172.

wind was from the E., and the sea ran high. The vessel had a signal flying, alleged by the master to be for a pilot, but understood on shore to be for assistance. The *Augusta*, Sherringham life-boat, with twenty-two fishermen, put off to the bark, and, their services being accepted, they conveyed her from Blakeney Bay to Wells Bay, intending to carry her thence to Holkham Bay, where there was good anchorage. Here the vessel twice parted from her cables, and they ran for Brancaster Bay; but, proceeding through a narrow channel, between the Bridgirdle Sand and Burnham Flats, she got upon the tail of the former; she afterwards floated off, and (the crew having left her,) drifted on shore on the Brancaster coast. The owners of The Dygden resisted the claim for salvage, on the ground that the pretended salvors had, in reality, saved nothing, but had subjected the owners to loss; that it was not a case of merit, but of great demerit, since the proper course was not to have taken the vessel into Wells or Holkham Bay, but to have anchored in Blakeney Bay, where she was, or to have stood off and on till the tide served to have taken her to the north, or across the Blakeney Over-falls, by the Dudgeon, to the Spurn Light, and anchored in Hawk Road, at the entrance of the Humber. The value of the property was 1,100*l*. The court was assisted by Trinity masters,¹ the question turning solely on nautical points.

Addams, D., and *Curteis*, D., for the salvors; *Sir J. Dodson*, Q. A. and *Bayford*, D., for the foreign owners.

DR. LUSHINGTON. When persons offer their services to vessels in distress, and there are no other individuals on the spot capable of rendering more efficient assistance, this Court must look with considerable indulgence at their efforts; because, being the only [* 117] aid that can be procured, and offered *in a state of great exigency, every allowance must be made if they are not possessed of adequate knowledge to perform the duty they had undertaken. But different considerations will apply to the conduct of individuals who assume the character of salvors, when there are persons competent to discharge those duties. In this case, if the present salvors had declined to undertake the task, there was an opportunity for other individuals to have gone from the shore, who would have stood in the place of these persons, and some of whom must be esteemed competent persons, because they were pilots.

¹ Capt. Locke and Capt. Fitzroy.

whose particular office it was to conduct ships on that coast. In ordinary cases, all that you can expect from persons attempting to perform the duties of salvors is, the possession of ordinary skill and ability. Of course, we could not expect from Sherringham fishermen the same nautical skill that we expect from pilots, whose sole occupation it is to navigate vessels.

The foreign vessel had suffered no damage from storms, or mischief of any description; no loss of sails or anchors; but they were ignorant of the locality, and were proceeding in a course which might have led them into danger, had they not resorted to the advice of persons acquainted with the coast. Taking the averments on the one side and on the other—the salvors asserting that they pursued the course which, under the circumstances, was best calculated to insure the safety of the vessel; the owners averring that the conduct of the salvors was unseamanlike, improper, and calculated to cause the loss of the bark, and evinced a complete ignorance of the shoals and soundings of that part of the coast, and of the proper course and mode of navigation, the Bridgirdle Sand being the most dangerous of the shoals;—these being the averments, the questions I put are these: Whether what the boatmen did, under all the circumstances of the wind, the weather, the size of the ship, the dangerous shoals by which it was surrounded, was a proper, judicious, and seamanlike course? whether a better and safer course would not have been practicable, remembering the state of the wind, the weather, and the tide? In short, whether these fishermen conducted themselves with that ordinary degree of nautical * skill to be [* 118] expected from every man who voluntarily undertakes the charge of a vessel so placed? I say “ordinary skill,” for that we have a right to require of them, they having assumed the duties of pilots when there were pilots ready to perform them.

The Trinity Masters. We are decidedly of opinion that the fishermen who went out in the Sherringham boat took the most erroneous steps from the beginning to the end of the proceedings. Instead of taking the bark to sea, after the tide flowed, so as to enable her safely to cross the Blakeney Overfalls, they run her to leeward, in a most dangerous place.

JUDGMENT.

DR. LUSHINGTON. Under these circumstances, I must necessarily pronounce against the claim for salvage. The only point that remains is the question of costs; and I entertain considerable doubt whether it is not my duty to condemn the fishermen in the costs of this suit, because I feel the strongest conviction of their misconduct.

But, at the same time, I will give them the benefit of any doubt; and, it may be, that the course they pursued was honestly pursued, and may have arisen entirely from ignorance or a misunderstanding of the measures that ought to have been adopted; and, looking at the difficulties, I think, upon the whole, I am not bound to follow the sentence up by a condemnation in costs. The punishment of paying their own costs will, I hope, induce them to be more cautious in future.

THE WINDSOR CASTLE.

Act on Petition.

July 21, 1841.

Possession. A master of a vessel cannot, in such a cause, dispute the title of the owner

THIS was a suit on the part of Messrs. Johnson & Co., alleging themselves to be sole owners of The Windsor Castle, to displace the master, (Manuel,) who had given an appearance, and an act on petition had been entered into, supported by affidavits. It appeared that the vessel, on the 22d October last, in going down the river, on a voyage to Australia, met with an accident, and whilst detained for repairs, the original owner, Burton, having transferred the property of the vessel, by bill of sale, to Johnson & Co., became bankrupt. [* 119] The validity of the transfer was, however, a matter of litigation between them and the assignees of the bankrupt. The sale took place on the 6th November, twenty-three days before Burton's name appeared in the Gazette (the 29th.) On the 20th, Johnson & Co. obtained from the master the documents relating to the ship, and on the 10th December they appointed another master; but Manuel, not having been released from his liabilities to shippers and others, and not having received payment of moneys due to him, refused to give up the ship. He now stated in his act and affidavits facts to show that Johnson & Co. were not *bona fide* owners of the ship; that the transfer from Burton was only colorable; that certain proceedings took place between them and the original assignees of Burton, which had been brought under the cognizance of the Court of Review; that the assignees originally appointed (who had colluded with Johnson & Co.) had been removed, and new assignees substituted; that Johnson & Co. had agreed to give up

the vessel, and that, if time were allowed for the newly-appointed assignees to come before the court and assert their rights, they could establish their title as owners.

Addams, D., for the master. Johnson & Co. were not the owners of the vessel: it is sworn that they had given up their title to the assignees of the bankrupt; and even if they have not, it is a question whether they could dispossess the master without an indemnity. There is no case of a cause of possession between an owner and a master who does not set up an ownership.

Nicholl, D., for Johnson & Co. We are the registered owners; it is sworn that we are the owners of the ship. The vessel is arrested; the warrant is notice to all concerned, and there is nobody before the court to controvert our title. The master acted under the directions of Johnson & Co. as owners. On what principle can a master dispute the title of the owner? He is the servant of the owner, and has no lien on the ship, and cannot retain it against the assignees of a bankrupt owner. *Wilkins v. Carmichael*.¹ All we want is power to sell the ship for the benefit of all parties; [* 120] we are ready to bring the proceeds into the registry.

JUDGMENT.

DR. LUSHINGTON. It is a matter of ordinary course in this court, in causes of possession, where the sole owners of a vessel, or the majority of persons who have a right or title, join in the suit, to displace the master who may have possession, and restore her to the owners: where questions have arisen of great difficulty as to complicated title, the court has declined to interfere. In this case, the new assignees have not come before the court: and when the case was before it on a former occasion, I suggested, that if they intended to dispute the validity of the transfer, it was their duty to come here and assert their right and title. If they had come, and had made out either that the title of Johnson & Co. was so doubtful, that the court ought to hesitate before it acted upon it, or that the title was clearly in the original bankrupt, the court would have held its hand. But no persons holding that character have come and made any representations at all; therefore, the sole question I have to consider, on this part of the case, is, whether it is competent to the master to appear and allege a title in some one else. I am clearly of opinion

¹ Doug. 101. *Abbott, Shipp.* p. II. c. 3.

that this can never be permitted in a cause of possession. The only extent to which a master can allege the title to be in another person, is where it is done for the purpose of inducing the court to give further time for the appearance of the assignee of the sole owner: the court would allow a master or other person to make such an application, and would grant further time if necessary. But I am asked taking the facts to be true, to make a decree in favor of the master. I could not, however, make such a decree, if the facts were proved. I apprehend it to be a clear principle of law, that where a master undertakes the charge of a vessel, he does so upon the sole responsibility of the owner. He cannot have any lien on the vessel; whatever may happen of good or evil to the person who appointed him, or his successors, he could not enforce any lien against the vessel.

[* 121] * I have no hesitation in saying that the court must direct the ship to be delivered up to Messrs. Johnson & Co., as the owners.

Nicholl asked for the costs, which the court refused.

[* 376]

* THE WILHELMINE.¹

Act on Petition.

March 2, 1842.

Salvage. A suit for compensation not sustained, on the ground that the vessel (a foreigner) was not in danger. A commission of appraisement improperly taken out.

THIS was a claim by the master, owners, and crew of the steam-vessel *Robert Burns*, belonging to the Commercial Steam Navigation Company, of salvage for services rendered to The *Wilhelmine*, a Hanoverian galliot, on the 12th October, between the Needles Point and Hurst Castle, Isle of Wight. The owners of the galliot resisted the demand, on the ground that the vessel was in no danger, and that the master merely wanted a pilot. The owner of the galliot had alleged the value of the property to be 400*l*. The salvors represented it at 620*l*. A commission of appraisement was thereupon taken out, which returned the value at 320*l*.

¹ 1 W. Rob. 335.

Addams, D., and *Robertson*, D., appeared for the salvors; and *Haggard*, D., and *Harding*, D., for the owners.

JUDGMENT.

DR. LUSHINGTON. When I originally read the papers in this case, it appeared to me to be one of some difficulty; not on account of conflicting evidence only, but because some of the disputed questions were of a nature so purely nautical, that I could not, with entire satisfaction to my own mind, form my opinion of them. My difficulties were not removed by what passed at the hearing; and, regretting the want of the assistance of Trinity Masters, I felt it my duty to take time to consider, and to endeavor to obtain from the best sources some information upon local and nautical points which it was impossible I could possess.

It appears that The Robert Burns steamer left Southampton on the 11th October, bound to Plymouth, with between twenty and thirty passengers; that, in consequence of a gale from the S. and W., the steamer anchored off Yarmouth for the night, and in the morning set sail. In a subsequent part of the proceedings, it is alleged, on behalf of The Robert Burns, that another steamer, The Transit, suggested to The Robert Burns to go to the assistance of a vessel said to be in distress on a lee shore; and the reason assigned why it was suggested that The Robert Burns should go, in preference *to The Transit, was, that the former was of [*377] lighter draught. Certainly, unless the master of The Robert Burns had verily believed that this vessel was in want of assistance, it is difficult to suppose that he, with so many passengers on board, would voluntarily have delayed her voyage, without necessity; but, assuming this to have been the honest conviction of the master, it is still the duty of the court to consider and determine whether The *Wilhelmine* really stood in need of any assistance beyond that of a pilot. And this brings me to the first and most material point in controversy—whether The *Wilhelmine*, when riding at anchor, was in a dangerous situation, requiring salvage assistance? What was her distance from the shore? The salvors say—and here is a very great discrepancy in the evidence—that she was close to the shore; another expression is, that she was about a cable's length from the shore. The evidence for the owners of The *Wilhelmine* states that the distance was from three quarters of a mile to a mile. The best solution of this difficulty, where the evidence is so conflicting, and where I should most reluctantly impute wilful and corrupt misstatement to either party, is, to take the actual distance as between the two statements.

Before deciding whether this vessel was in a state of danger or not, it would be well to consider whether the master of the galiot believed she was in danger, and, acting on that belief, whether the flag hoisted was for a pilot or for assistance; for, if the latter, it would at least prove that, in his own judgment, he deemed his vessel to be in some degree of peril. Upon this part of the case I think the evidence strongly preponderates in favor of the owners. The balance of disinterested evidence is in their favor, and the master has positively sworn to the fact; and on the principle I have before adverted to, of not hastily imputing perjury to any one, I should not be justified unless absolutely compelled, in attributing to him a wilful misstatement; and of the fact, whether he hoisted a signal for a pilot or for assistance, he must have been cognizant. Looking, therefore, to the positive evidence from him, and those who formed the

[* 378] *coast-guard on the station, it is established, to my satisfaction, that the flag was a signal for a pilot only.

Coming back, then, to the question whether, in fact, and apart from the opinion of either party, and assuming the distance to be the medium between the conflicting statements, and taking the wind to be, as stated by the salvors, from the W. and S. W., and the tide to be on the ebb, which is undeniable, and the vessel drawing seven feet water—taking these to be the facts, and I think it is a just and fair statement to both parties,—was the vessel so circumstanced in danger, and did she require assistance? Not at all doubting that the masters of the steamers who have given evidence are possessed of reasonably competent knowledge to enable them to give an opinion upon the question, yet I must recollect that the *onus probandi*—the *onus* of proving the danger which they allege, and which is the very foundation of their claim to salvage—lies strongly and justly on the salvors; and if the question stood on balanced evidence, I cannot say that the salvors' averment is proved. Now, looking at the opposing evidence—that of the lieutenant of the coast-guard, a person most competent, from his local knowledge and nautical skill, to give a correct opinion; perfectly disinterested, and against whom I cannot find even the slightest ground for imputing bias; the light-house keeper at Hurst Castle, a witness deserving great weight in a matter of this kind, which must be within his knowledge and nautical experience; and adding to these the coast-guard boatmen, who depose to facts of importance, of which they had the means of forming an accurate opinion—looking at the whole of the evidence, I have no hesitation in saying that the balance preponderates greatly against the vessel being in any danger whatever.

But I was reluctant to leave such a question as this upon the mere

comparison of weight and credit due to statements so conflicting, on such a subject, and more especially as local knowledge and nautical skill might throw light upon it, and enable me to adjudicate between the parties with greater security and more to my own satisfaction. I therefore caused inquiries to be made as to the nature of the ground * itself, with reference to the given circumstances [* 379] already stated, of the wind, tide, distance, and draught ; and I am perfectly satisfied, from the result of these inquiries, made of persons who have great local experience, and knew nothing of this case, nor the purposes for which the questions were asked, that the weight of evidence in the cause and the truth coincide, and I am enabled, with confidence, to say, both with regard to the evidence itself and such local information as I have been enabled to obtain, that this vessel was not in any danger whatever.

In further corroboration of this view of the case, I am well satisfied that the master and crew of The Wilhelmine did, in the conviction that there was no danger, voluntarily refuse the proffered aid of a rope, which the steamer attempted to send on board, and of which, had they been disposed, they might have availed themselves ; nor can I believe that the galliot's people laid themselves along the bowsprit, jib, and flying jib-boom, with the intention of catching the rope.

With regard to the galliot's slipping from her cables, that undoubtedly is a circumstance which weighed very strongly with the court at the time of hearing, and is not lightly to be passed over ; but, so far as I am capable of forming a judgment, it is not a proof of actual danger ; it is a measure of precaution, frequently resorted to, for the sake of convenience and expedition, and that at a small expense ; for it is well known that, by attaching a buoy to anchors and cables, they may easily be recovered. I am not, therefore, justified in considering that circumstance, standing alone, as the least proof of the vessel being in a state of peril.

Now, I do not think it necessary to enter into detail with respect to the further facts ; for, if there was no danger when the vessel was lying at anchor, undoubtedly, there has been no salvage service performed. When the galliot was proceeding with a fair wind to Cowes, it is impossible to contend that the putting two men on board could support a claim for salvage reward. I entertain, indeed, very considerable doubt whether, when a pilot was at hand, this proceeding was even justifiable. The court has also to regret * that, in such a case as this, the salvors should have [* 380] taken out a commission of appraisalment—a proceeding, in any view I can take of the case, wholly unjustifiable.

I am of opinion that the claim for salvage has wholly failed ; that

there is no just ground for the demand; and I must dismiss the galliot, and condemn the asserted salvors in the costs.

¹ No bail had been given, and on the proctor for The Wilhelmine praying a *supersedeas* of the warrant of arrest, the court decreed it: but, on a subsequent day, it thought there was a difficulty in issuing the *supersedeas* immediately, and allowed a week (as a reasonable time) to elapse.

In the sittings after Trinity term, the proctor for the owner moved the court that the adverse proctor might be assigned to set forth his clients' names, with special reference to the owners of The Robert Burns. The proctor for that vessel submitted that he was not now bound to do so, and stated that, in fact, he did not know who the owners were, the action being entered in their behalf as matter of course. The court, however, held that the proctor was bound to know all the parties for whom he appeared, and to state their names, otherwise proxies would be required.

Proctors:—*Deacon*, for the foreign owners; *Addams*, for the asserted salvors.

[* 502]

* THE ST. CATHERINE.

November 27, 1835.

A bottomry bond attached as made on personal credit by an agent, upheld.

SIR JOHN NICHOLL. This is a suit to enforce the payment of a bottomry-bond. The party bringing the suit is Mr. Willis, of Liverpool, agent of Messrs. John and Phineas Williston, merchants of Miramichi, and it is brought against the vessel and freight. The vessel was arrested, and an appearance was given for the assignees and creditors of the owner, Mr. William Austin Groocock, of London, who had become a bankrupt before the execution of the bond. The bond is for 899*l.*, and bears twenty per cent. maritime interest, amounting together to about 1,000*l.*, and it is dated the 26th November, 1834.

The facts and dates of the transaction out of which the bottomry bond arose, are material. There is nothing on the face of the bond itself calculated to affect its validity. From the evidence, it appears

¹ 1 W. Rob. 346.

that, on the 1st September, 1834, the ship, which is of the burden of 194 tons, was chartered at Liverpool, to Messrs. Willis and Swainson, as the agents of Messrs. Williston, of Miramichi, on a voyage from Liverpool to Miramichi and back again, with a cargo of timber. The vessel accordingly sailed on the 7th of September, William Sinclair being appointed to the command of the vessel by Messrs. Willis and Swainson, with the privity and approbation of Mr. Grocock, the owner. On the 6th September, the charterers sent a letter of instructions to the master, directing him, on his arrival at Miramichi, to apply to Messrs. Williston; telling him that they would give him all possible despatch, (it being late in the season when the vessel sailed,) and that they would pay the necessary disbursements,—the bills are directed to be sent through them; but the *charterers say, in the letter, that they expect he will [* 503] use the utmost despatch and economy; and they give him a copy of the charter-party. On the same day, (the 6th of September,) Messrs. Willis and Swainson wrote a letter of advice to Messrs. Williston, at Miramichi, desiring them to watch the conduct of Sinclair, the master, who had been recently appointed to the command of the vessel; telling them that, when he had to pay bills, it was to be through them; and it is particularly mentioned in the letter, “for reimbursement you will draw on Mr. Austin Grocock, of London;” so that for the small sums of expense which might be incurred at Miramichi, they were not to draw upon the charterers, Messrs. Willis and Swainson, but upon the owner. In the latter part of the voyage, more particularly, the vessel met with tempestuous weather,—on the 10th or the 11th October. She was dismasted, suffered severely in her rigging and hull, and on her arrival at Miramichi, the master applied to Messrs. Williston, and on the 23d October, made his protest. A survey of the vessel was recommended, (which was very proper,) and, accordingly, it was surveyed by three merchants, and repairs were recommended. The damaged rigging was sold as useless, and the vessel was repaired and put in a condition to fit her for returning to Europe, agreeably to the charter-party. She received these repairs with all possible despatch, which was necessary at the latter end of October, for there was danger, in the Gulf of St. Lawrence, of being detained by the ice, and of incurring loss by remaining during the winter. The vessel was repaired by advances made, and the bills were paid by the Willistons of Miramichi; they were completed by the end of November, when the vessel was ready for sea. Accounts were regularly drawn out, and there *are vouchers for [* 504] each bill that was paid; there cannot be more regular

accounts than these which are annexed to the protest of the master, and which were sent to the owner. The accounts are not made out as against Messrs. Williston, but against Mr. Grocock, the owner of the vessel; they are headed, "The owner of the brig St. Catherine, and all concerned, to John and Phinebas Williston, for repairs and supplies and necessaries provided for the said vessel." Under the first column are the dates of the bills, and other columns appear to be appropriated to the dates of the vouchers; and amongst other dates, are several on the 25th November, and the total is 765*l.* 10*s.* 5*d.*, with a commission of five per cent., and the net proceeds of the stores sold are deducted. So that it is impossible to desire an account more fully and fairly made out; and the account is dated the 26th of November. On the same day, a letter was written by those persons, by whom the advances were made, to their correspondents at Liverpool, and in the letter was enclosed the bottomry bond, which was also dated the 26th November, and executed in triplicate. A bill of exchange was signed in triplicate on the same day; a special messenger was sent with the enclosure, containing the bottomry bond and the bill of exchange, (one of the three,) to a port at a little distance, to forward them to Liverpool by the earliest conveyance. If these are facts, it is difficult to conceive how this should not be a valid bottomry bond, or that the whole transaction is not perfectly fair and honest on the part of the merchants at Miramichi, who took the bond for the advances they made.

But it has been contended that the advances were not made on the credit of the ship or of the owner, but on the credit of Messrs. Willis and Swainson only. On what possible ground can it be contended that Messrs. Willis and Swainson had undertaken to be responsible for these advances? They had undertaken to be responsible for no advances; in their letter of advice, they desired their correspondents to keep a sharp look-out on the master, and to pay necessary expenses, and the whole of these expenses they expected would amount to about 35*l.* or 40*l.*; and even for this small sum, they were not to draw upon Willis and Swainson, but upon the owner in London. How could it be supposed, under these circumstances, that these persons at Miramichi would advance 800*l.* for the repairs of this vessel, and look only to their correspondents at Liverpool for repayment of this sum, when, for the small sum [* 505] they were authorized to advance, they were to look * to the owner? And the whole course of the transaction shows, that the advances were made on the credit of the ship alone. The only credit of Willis and Swainson was to the extent of 35*l.* The Willistons had no knowledge of the owner of

the ship; they had no knowledge of the master — he was a new man. On what possible ground can it be supposed that persons in these circumstances would have made advances without the credit of the ship, and without a bottomry bond? It has been said that there was no mention of a bottomry bond till the vessel had sailed, when, having met with an accident in the river, getting aground, and being obliged to be got off, the master came on shore, and then, for the first time, he was asked for a bottomry bond. This is asserted by the master, but it is incredible in itself, and the master has contradicted himself in some of his assertions; for he has said that the bond was executed on the 28th; then he goes back, and says it was on the 27th, after he went ashore to complete his protest; whereas all the facts and letters show that the instrument was executed on the 26th. But it is said the master was not told of it till the time of execution. This is denied and expressly contradicted by the affidavits of Mr. Williston, his clerk, the notary, and carman, who all depose the same way, though not *totidem verbis*, which serves to confirm each other, and to show the fairness of the transaction, and the knowledge of the master that a bottomry bond was to be taken; it is, therefore, an after-thought, and not, I think, entitled to any credit. Looking to the facts of the case, considering the utter improbability that advances would be made on any other credit than that of the ship, the state of the ship, and the fairness of the conduct of the party, who, in their letter, declared that they were not desirous of taking advantage of the maritime interest, and that, if the bills of exchange were accepted, they were willing to receive the sum they were out of pocket, provided they were secured by an early conveyance, otherwise they would rely upon the bond — there is nothing which is not perfectly honest and liberal on the part of the merchants. Where money is actually wanted for the repair of a vessel in a foreign port, where the master is without credit, and where there has been no extortion, it is the duty of the court, and it is for the interests of commerce, that bottomry bonds should be strongly upheld. What might have been the consequence if the correspondents of the charterers at Miramichi had not made this liberal advance of money? Why, the vessel might have been laid up all the winter, and could not have fulfilled her charter-party. As to the information of the bankruptcy of Grocock arriving at Miramichi prior to the execution of the bond, the court is called upon [*506] to infer this from the affidavit of Mr. Sanders. But the very statement he makes satisfies me that the information of the bankruptcy of Grocock had not arrived at Miramichi on the 26th November. There is certainly a possibility of its

having arrived ; but that the London Gazette had reached Miramichi, or any thing but extracts from English newspapers, through foreign newspapers, or that any information of the bankruptcy of Groocock had been received, is disproved, I think, by the facts and circumstances. I am not quite prepared to say that, if the information had arrived, the party who had advanced the money might not have been at liberty to resort to a bottomry bond. But it is not necessary to give any opinion upon that point. The assignees of the estate cannot be placed in a better situation than the owner himself was ; and the owner was bound by the act of the master when he hypothecated the vessel in a foreign port. I am quite satisfied that the bond was given for a fair consideration, and that it is a valid bond. I therefore pronounce for the bond, in favor of the holder, and for the expenses incurred in recovering its payment.

4

CASES

SELECTED FROM VOLUME II.

OF

NOTES OF CASES.

[THE CASES SELECTED ARE THOSE NOT REPORTED IN THE REGULAR REPORTS.]

1842-1848.

NOTES OF CASES.

VOLUME II.

[* 18]

* THE SELINA.

Act on Petition.

November 12, 1842.

Salvage. In ascertaining the value of the property forming the fund, a loan on bottomry and wages subsequent to the service are proper deductions, but not wages prior thereto.

THIS was a cause of salvage by her Majesty's ships Buzzard and Isis, against The Selina, which, having sailed from Liverpool in March, 1841, to the coast of Africa, lost the master, mate, and part of the crew, in the Bonny and Brass rivers, and being in exigency, was brought home in charge of an officer of one of her Majesty's ships. There was no dispute respecting the facts; the only question was, as to the deductions from the fund out of which the compensation was to be decreed. The value of the ship and cargo was 869*l.*; the deductions amounted to 800*l.*, leaving only 69*l.* Amongst the deductions were a bottomry bond for 339*l.*, taken up by the salvors on the voyage home, and 324*l.* for wages due before the service commenced.

Sir John Dodson, Q. A., for the salvors; Haggard, D., and Elphinstone, D., for the owners.

JUDGMENT.

DR. LUSHINGTON. I have no doubt that the bottomry bond is a true deduction, and that the wages earned since the service are properly deducted, because without the men the vessel could not have been brought safely to this country; but I have considerable doubt

The *Wilhelmine*. 2 Notes of Cases.

as to the 324*l.*, the sum originally due for wages; for, supposing a ship to be in distress, and salvage services to be rendered, I question whether the claim for salvage would not take priority of wages earned before the occurrence took place; whether the salvage must not be paid before the wages, which are a lien on the ship.

[* 19] If the question had been solely between the * original seamen and the salvors, the wages would not have had priority over the salvage. I take it that their wages have been saved to them as much as the ship and cargo to the owners. My impression is, that I must take the value to be (adding the 324*l.* to 69*l.*) about 400*l.* I think the only decree I can make is, that Mr. Budd be reimbursed the expenses he is out of pocket. I cannot go beyond that; I take them at 120*l.*, and give him the costs.

THE WILHELMINE.
Act on Petition.

November 22, 1842.

In a suit for salvage, commenced in the name of the owner of the salving vessel, but without his sanction or knowledge, such owner (the asserted salvors being condemned in costs) is liable to the owner of the vessel wrongfully proceeded against.

In a cause of salvage against *The Wilhelmine*, a foreign vessel, by the master, owners, and crew of *The Robert Burns*, steam-vessel, this court pronounced against the claim, dismissed the foreign owner, and condemned the pretended salvors in the costs.¹ These costs not being paid, the proctor for such salvors was directed to set forth his clients' names, with especial reference to the owners of *The Robert Burns*. In obedience to this assignation, the proctor brought in a copy of the register of the vessel, whence it appeared that Mr. Joseph Robinson was the sole owner, against whom a monition issued for payment of the costs (106*l.*) of the suit, and of the monition and service. The monition being returned, duly served, the proctor for the foreign owner prayed an attachment against Mr. Robinson for non-obedience to the monition; when the proctor for the salvors declared he proceeded no further, and another proctor appeared for

¹ See 1 W. Rob. 335.

Mr. Robinson, and prayed to be heard on his petition against the issue of an attachment. The act was brought in, and alleged that Mr. Robinson had been no party to the action, which had been entered without his sanction or knowledge; that he had not been conusant of the suit, and had not, directly or indirectly, had any communication whatever with the proctor for the salvors on the subject.

* *Bayford*, D., for Mr. Robinson, was about to argue [* 20] against the issue of an attachment against him, when he was stopped by

THE COURT calling upon the other side to show why an attachment should issue against an owner who had not given authority to enter any action on his behalf.

Haggard, D., for the foreign owner. The action was entered in the usual form, and it would be a great inconvenience in the practice of the court if it does not give effect to its own decree.

PER CURIAM.

That is not the issue, which is, whether I can attach this person—whether I can make Mr. Robinson responsible for the costs.

Haggard, D. The action included the owners of the vessel, and the decree was in the ordinary form, condemning the parties by whom or on whose behalf the action was entered. If the claim had been pronounced for, a part of the salvage remuneration would have gone to the owner, Mr. Robinson.

JUDGMENT.

DR. LUSHINGTON. With regard to the present application, it is impossible that I can entertain a shadow of doubt. What are the facts? An action is brought in the name of the owners of the vessel, and after the action was determined by a decree of the court, Mr. Addams, who appeared for the owner, was required, in the following terms, to set forth the names of the owners: "On the 29th June, Mr. Addams not having brought in an act on petition, which he had been assigned to do, Mr. Deacon repeated the prayer made by him on last court-day; Mr. Addams objected to set forth the names of his parties, the owners of the steam-vessel *Robert Burns*;" I overruled the objection, assigning him to set forth the names by the 5th July. Now, what was the real intent, meaning, and purport of that assignation? Why, the very words of it are, that he should set forth the names of the owners, his parties. On the 5th July, the minute is

in these words: "Addams, in obedience to the order of the court, brought in a copy of the register of the steam-vessel, *The Robert Burns*, certified by the deputy marshal of this court." This purports to be done "in obedience to the order of the court;" but the order of

the court was "to set forth the names of his parties, the [*21] owners of *The Robert Burns*." It seems to me that this was no compliance with the order of the court at all; in name, indeed, it might be a compliance; but in true effect it was not, for it now clearly appears that the person, whose name is on the register of the steam-vessel, was not the party for whom Mr. Addams did appear. What are the undisputed facts? It is sworn by Mr. Robinson, and not contradicted, that the action was entered without his sanction, authority, or knowledge; that he never, in any way, or on any occasion, himself, or by any agent or other person, requested Mr. Addams to enter the action, or take such proceeding on his behalf, or that of any one else; that he never was in communication with Mr. Addams, and that he was totally ignorant of the whole proceeding till he was served with a monition on the 13th July, to pay the taxed costs. The question, therefore, which I have to decide is, whether a person so circumstanced is liable to be attached for disobedience to the monition of the court for the payment of such costs.

The power of the court can be exercised against Mr. Robinson only in consequence of some act done by himself, or some liability which attaches to him by law. As to any act done by himself, it is quite clear that he did no act at all, and that he had no consance of the proceedings. As to the other point, the liability of the owner of a vessel for costs incurred in an action carried on without his permission, acquiescence, or knowledge — such a proposition has never been attempted to be maintained at bar here or anywhere else. I know of no person who has authority to commence an action for the owner besides himself, except his own duly authorized attorney.

It has been argued that Mr. Robinson would have been entitled to all the benefit of the suit if it had been decided in favor of *The Robert Burns*. I do not know whether it would have been so or not; but if it were so, that would not in the slightest degree alter the case, because it would arise from this circumstance, namely, that the validity of the appearance on his behalf would not have been questioned, and the court, in allotting him a portion of the sal-

[*22] vage, would have relied on the fact, which no one put in issue, that the proctor was duly authorized to appear for him.

I have no hesitation, therefore, in saying that this gentleman is entitled to be dismissed, and with his costs.

* THE HIGHLANDER.

[* 316]

Motion.

May 5, 1843.

A warrant of arrest, to prevent the vessel from being taken out of the country, refused on the application of a mortgagee.

THIS was an application on behalf of the mortgagee of a moiety of the vessel (with power of sale) for a warrant of arrest to prevent the vessel, which was about to sail, from being taken out of the country without his consent.

Addams, D., supported the application.

JUDGMENT.

DR. LUSHINGTON. I am not aware of any case in which such an application has been granted. The statute does not enlarge the jurisdiction of the court in this respect, and I doubt whether I could grant a warrant of arrest on the application of a mortgagee. But I will consider the point and let the registrar know.

(The motion was rejected.)

SUPPLEMENT.

* THE QUEEN *v.* THE WINDSOR CASTLE; MEILICAN AND [* 53]
OTHERS, INTERVENIENTS, *v.* THE SAME.

IN IRELAND.

August 23, 1843.

Derelict. Salvage accomplished by fishermen with great intrepidity and skill, and at considerable risk. One fourth of a large property awarded to the salvors.

THIS cause was instituted by her Majesty's proctor for Ireland, on behalf of her Majesty, against the ship and her cargo, consisting chiefly of cotton, as derelict droits of admiralty, and the intervenients libelled as salvors thereof. Subsequently, the owners of the ship and cargo put in their claims, paid the costs of the crown, and tendered in acts of court 1,000*l.* for the salvage services of the intervenients. This tender having been refused, and a matter contrary and defensive,

denying the salvage services of the intervenients, having been pleaded on behalf of the owners, and several witnesses having been examined, the case on behalf of the intervenients came on for hearing in the court at Dublin; when

Gibbon, D., stated the case on behalf of the intervenients, the facts of which are fully set forth in the judgment; *Hayes*, D., and *Fitz-Gibbon*, Q. C., also appeared for the intervenients, and *Gayer*, D., *Radcliffe*, D., and *Battersby*, D., for the owners of the ship and cargo.

JUDGMENT.

DR. STOCK.¹ This is a suit in which the intervenients, David Meilican with thirty-four others, fishermen of the coast of Clare, in the parts adjacent to the mouth of the river Shannon, claim salvage for the preservation of the ship *Windsor Castle*, of Liverpool. This ship is of 700 tons burden per register, and capable of carrying 1,000 tons. She was laden with a cargo of raw cotton, the [* 54] growth probably of the United States,² and seems to have been bound for Liverpool on her return voyage from America. What the history of this voyage may have been, or what became of the crew, is unexplained in the evidence, and so remains a mystery; that it was, however, a most calamitous voyage, appears from the result. At daybreak, on the morning of the 13th March, 1843, the ship was on the high sea, three and a half or four miles off Loophead, to the north-west of that promontory, which is the termination towards the sea at the northern bank of the river Shannon, and projects into the Atlantic ocean a barrier of high and formidable cliffs. The ship was derelict, having been some time previously (but how long or under what circumstances I know not) abandoned by the crew. The pressure of the danger which impelled the crew to the act of abandonment must, however, I apprehend, be taken to have been very great, for clearly it was no hasty act, but a resolution deliberately adopted. When she was first boarded by the salvors, her state was this—she was dismasted, her bowsprit was gone by the stem, part of the stern was carried away, a piece of the rudder was broken off; her bottom, however, was sound. The masts had, I think it is evident, been cut away by the crew, because they were clean gone, with the chief part of the sails and spars, which

¹ Joseph Stock, Esq., LL. D., Q. C., her Majesty's First Serjeant-at-Law, Judge of the High Court of Admiralty, Ireland.

² The vessel was from Bombay, but it did not appear so on the evidence, or indeed from where she was.

were not found encumbering the decks, as would have been the case had the dismasting been merely the work of the winds, and not performed or completed by the crew. Something has been remarked of the scene of confusion which the cabin presented to the observation of those who first boarded. The doors were broken, the lockers burst open, the drawers fallen upon the floor; table upset, and all places strewn with broken bottles, boxes, earthenware, bread, coffee, books, papers, bedding, and other articles, suggesting to the salvors the belief that she had been first abandoned by her crew and afterwards visited by hostile hands. I do not, however, think it necessary * to make such an inference; the appearances, I think, [* 55] may be naturally explained by the situation of the vessel, drifting on the ocean in tempestuous weather, possibly for many days, certainly for many hours. But this I collect very clearly, that this ship was abandoned under the pressure of extreme necessity, in a state of the utmost peril and distress, and without the smallest hope on the part of the crew that the property they relinquished could by any chance escape final destruction.

The derelict was in this state when several pilot-boats, belonging to the village of Kilbaha, county Clare, situate on the river Shannon, not far from Loophead, proceeded, before day, to their usual occupation of fishing at the river's mouth. One of these boats, containing the promovent, James Hanrahan, an old and skilful pilot, and his three comrades, was three miles off Loophead, in a south-westerly direction, and when daylight permitted, these men discovered the dismasted derelict ship, then bearing north-west of Loophead, and being between three and four miles to sea. There was a light westerly wind; the distance of the pilot-boat from the derelict was about six miles; the tide was just on the turn from ebb to flood, and every thing joined and encouraged the design which was then instantly formed of approaching the ship and tendering assistance. In about an hour, or a little more, they made the ship in their canoe, a boat of a peculiarly light and agile description, commonly used in the Shannon. The time at which they neared the ship was about eight o'clock. I think it must have been, at this time and place, about low water, or very nearly at the end of ebb. The nautical books which have been referred to, and Dr. Gayer's argument, establish satisfactorily that such was the case; for it is shown that, on Thursday, the 16th of March, 1843, it was full moon at five o'clock A. M., and high water at the mouth of the Shannon at forty-five minutes after three o'clock in the morning; and then, by calculating the retardation, it results that, on the 13th, it was high water in those parts at twenty-one minutes after one A. M., and therefore ebb-tide at from

[*56] half-past seven to eight in the morning. *This topic has been greatly insisted on in the arguments of counsel; and the advocates of the impugnant vessel rely on it as showing that every natural circumstance on that morning favored the labors of the salvors — a fair wind, a flood tide, moderate weather, and safe anchorage not very distant from the scene. But it appears to me, and I think very clearly indeed, that if every one of these favoring circumstances had not conspired to befriend the exertions of the salvors, the preservation of the ship would have been nearly and physically impossible. Even with all these favoring circumstances, it strikes me that the success which attended the attempt of James Hanrahan and his companions to bring this vessel into the Shannon, is most wonderful and surprising; I do not believe that a greater feat could have been accomplished by the muscular strength and activity of fourteen or fifteen hardy and intrepid men, than was effected on that morning by those salvors, in clearing Loophead, and thus giving effect to the natural powers of wind and tide, by which, under their management, the derelict ship was brought to an anchor.

Be the state of the tide exactly what it may, it was eight o'clock when James Hanrahan arrived at The Windsor Castle. Off Loophead, and on the iron-bound coast of Clare, it need hardly be said that, even in calm weather, a heavy roll of the sea is almost perpetual; there was a heavy roll on this morning, and they were not able to board the ship without some considerable danger of a casualty: one of the men did fall into the sea in doing so, but it is said he was a lubber, and missed his footing by his awkwardness. I hardly believe that can be the case, for, if I can form an idea of nautical agility, it would certainly be in the person of one of these navigators of the Shannon canoes, who, it is said, can run round the gunwale of his light craft, when hanging amidst the waves of the ocean. There was danger of boarding the ship even on the morning of the 14th, when at anchor, in mild weather, in the river Shannon — so great was her pitching and tossing. This is admitted by the impugnants' own witnesses, and if Mr. Baldwin, of the coast-

[*57] guard, felt it *dangerous to go on board The Windsor Castle, even on the 14th, shall I pronounce it to have been perfectly safe and easy to accomplish that operation at sea on the morning of the 13th? I think there was danger, and a danger commencing then and continuing thenceforward for many hours, under various aspects, both from the fear of shipwreck and of plunder, and quite sufficient to try the fortitude of the bravest man.

Hanrahan, having boarded the ship, found her without a living soul; he had one hour before him — perhaps not more than half an

hour—within which it was possible, by measures of precaution, to effectuate the salvage of the vessel. I have stated her position, three miles to the north-west of Loophead, with a westerly wind and a lee shore. It is clear to demonstration, and indeed incontestable, upon the evidence of the nautical men examined by the impugnants, that, in that situation of things, being left without assistance, The Windsor Castle would have been ashore to the north of Loophead, and become a total wreck. The description of the coast of Clare, northward of Loophead, is well known to all mariners and mercantile men in the world, while, perhaps, there is hardly a more dreadful and inhospitable coast. The escape of a ship drifting northward would be a miracle.

Hanrahan, intimately aware, from his long experience and local knowledge, of the greatness of the peril to which The Windsor Castle was exposed, lost not a moment in adopting the most effectual measures. He got his canoe alongside, and with his three companions, boarded the ship, proceeded to rig jury-masts, and a particular description is given of the three small sails he contrived to set up. He was able to work the rudder to some effect, though it had been broken and injured; the ship obeyed it, and with the sails and rudder he got her head round to sea, the first and most necessary step for her preservation. Immediately after, another canoe, manned by the intervenient Meilican and five others, came up. A tow-line was taken over the bows, and the six men in this canoe now began to tow. Half an hour elapsed, when the salvors [*58] were joined by Martin Hassett and three assistants, in another canoe, and again shortly after by John Kane and three other men, in a fourth canoe; these eighteen men are to be accounted the principal salvors, for to them is due the rescue of the ship from the greatest and most imminent of all the danger in clearing Loophead. The first thing they had to apprehend was her going ashore to the north of Loophead; the second and a greater peril arose in nearing that head where the current and the force of gravitation, bearing on the heavy and inert mass of The Windsor Castle, would render the clearing of the cliffs in the very least degree problematical. Now, that there was a difficulty and danger in going round Loophead, I think it evident enough, even on the impugnants' own showing;—that is, on the evidence of the witnesses produced for the impugnants. Captain Triphook, a gentleman of unquestionable skill and experience as a seaman, and then in command of her Majesty's revenue cutter The Hamilton, is produced as a witness on the part of impugnants; on cross-examination the salvors asked him:—"Did you not hear, and don't you believe, that the pilots in their canoes

found the ship Windsor Castle, on the morning of the 13th of March, four miles north-west of Loophead, the wind being west, and the shore a lee-shore, and that they towed her round Loophead from that position?"—"I heard it, but I don't believe it."—"Why not?"—"Because the thing is impossible. If The Windsor Castle was four miles north-west of Loophead, with a west wind and a lee-shore, four canoes—no! nor all the canoes on the Shannon, could have brought her round Loophead, but in spite of them she must have gone ashore and been wrecked." Such is the opinion positively given by Captain Triphook, and he is echoed in this opinion by Charles McDonnell, a branch pilot, also produced on the part of the impugnants.

Now, nothing ever was proved in a court of justice more undeniable and incontestable than that this supposed impossibility is a fact which was actually accomplished; that the ship was found [* 59] in the identical spot alleged, and * under the circumstances stated, and did nevertheless come round Loophead, under the towage and pilotage of the promovents.

It is true, that a gentleman who should be entitled to some degree of consideration, on account of a knowledge of seamanship, has been produced by the impugnants—I mean Mr. William Randall, agent to Lloyds—and he says that, in his opinion, the ship would have come up the Shannon by drifting alone, without either pilotage or towage, and would, in due time, have made her appearance, of herself, side-foremost, at the anchorage near Kilbaha, without touching any of the cliffs. In this opinion, however, Mr. William Randall is directly at issue with Captain Triphook and every other witness in the cause, and I pay no regard to this opinion, which appears to me to be at variance not only with the bulk of evidence in the cause, but with the plain dictates of experience and principles of physical science. Conceive the heavy unaided bulk of this great ship, drifting slowly in the tide, close under the enormous precipices of this headland, 250 feet in perpendicular height; does it stand to natural reason that her weight must not have borne her to the rocks? I rest, however, on safer grounds than any speculation or reasoning *a priori*; I have the decided testimony of reluctant nautical witnesses—Captain Triphook, Charles McDonnell, and Mr. Baldwin—who without the slightest hesitation, concur in pronouncing the most unqualified opinion that, if left to herself, she must inevitably have gone ashore and become a total wreck.

Now, much argument has been expended on the facts connected with the construction, framework, weight, and materials of these canoes. One of the canoes was brought up from the Shannon, and placed at the doorway of the Court of Admiralty, that the court

and the court might have the benefit of a view. It is contended that, on a comparison of the weight and fabric of the canoes, and the size and tonnage of The Windsor Castle, it is self-evident that two or three of such canoes, manned with ten or fourteen men, could not possibly move The Windsor Castle from a *state [* 60] of rest by towing, nor produce the slightest effect upon, or communicate the slightest motion to, the ship. The canoes are of a singular, compact, and neat texture, but so light, that an eight-oared canoe can be carried on a man's shoulders. Now, the question is, could ten or fourteen men, getting in those little boats, perceptibly affect The Windsor Castle by towage? All that was required was, that they should apply a force capable of countervailing the natural influence which tended to impel the vessel to the rocks; the rest would be performed by the current and the wind.

Now, I cannot say it strikes my mind that, either in theory or in the analysis of the evidence, there is any thing absurd in the supposition that these fishermen, sitting in the canoes and laboring as they did with the utmost and most strenuous exertions that human beings could apply, should be able to produce just that degree of effect, and no more, on The Windsor Castle, which was absolutely necessary to preserve her from following the laws of gravitation and dropping gradually to the rocks.

Another important question was debated in the argument — and that is, supposing there was difficulty overcome, “ Was there further danger encountered in clearing the headland ? ” On this point, Mr. Fitz-Gibbon, for the salvors, dwelt in powerful and pathetic language on the situation of the persons concerned, and drew a picture of the perils of that situation, remarkable, in my judgment, for a considerable degree of truth and probability, as well as for eloquence. According to Mr. Fitz-Gibbon, when those fishermen agreed together, as they say they did, to attempt the rounding of Loophead, they hazarded the lives of all, or at least of some of them, on the success of the undertaking; for he contends the ship went nearing the cliffs to a distance so small as that it was all but destruction, such as was never known before in that place. He says, the men's attention was wrapt up in the accomplishment of their object; that under Loophead there runs a dreadful surf, and that a long swell goes rolling in from the sea and dashes upon the bottom * of the [* 61] cliffs; that the men would never give over till the moment in which it appeared certain The Windsor Castle was inevitably running on the shore, and he says *then* it would have been too late, amidst the breakers, to have provided for their own safety. I cannot help saying, this appears very probable to my mind, and, therefore,

I am in nowise surprised when I find competent and uninterested witnesses, who surveyed the whole scene from the summit of the cliffs, (themselves calm and aloof from the action,) declare, upon their oaths, that there was visible and serious danger to the lives of all concerned; the salvors themselves, in the ardor of the action, might have been partly unconscious of the magnitude of the danger, but that it existed, I cannot now reasonably doubt.

They now got the ship into the entrance of the river, but the salvage was not yet complete; they had to anchor her in that exposed and dangerous place. The tide was running to ebb about three o'clock in the afternoon. When they got into the river, the country people came about the ship in their canoes, and danger under a new form was presented to the minds of the salvors, from the disposition to plunder which began to be displayed by the intruders. What increased the difficulty of the salvors was, that they were obliged necessarily to direct their whole attention to the care of the ship and the preparations for bringing her to anchor. During this period, the country people did begin pillaging, and some articles, of no great value were stolen. At Horse Island, within the Shannon, the salvors, originally eighteen in number, were reinforced by seventeen other pilots or fishermen, who were received by the former into a fellowship of the salvage. All their efforts were absolutely necessary. At between Horse Island and the quay of Kilbaha, about a mile and a half from shore, the anchoring was effected at the turn of the tide. It was admittedly an operation attended with considerable difficulty. The anchor was 16 cwt.; the chain cable was excessively heavy, and foul in the coiling; one chain was unbent from the anchor, [* 62] and below in the vessel's hold; the sheckle-bolt of the * second chain, which secures it to the anchor-ring, was started in the sheckle, and unfit for service. The pilots and fishermen removed the sheckle, and having passed the chain cable through the ring of the anchor, and taken a hitch or knot upon it, they made it secure to the anchor with another small chain. They next proceeded to remove the anchor with handspikes off the top-gallant forecastle, and with great exertion pinched it over the gunwale. They cleared and payed out seventy fathoms of chain cable; the depth of the river was forty-five fathoms in that place. The tide was very strong, and paying out the cable must have been terrible, without any of the mechanical helps usual on such occasions. The ship was brought to anchor at the very moment the tide began to ebb; the early part of the night proved tempestuous, the wind coming round to the south, which made the shore before her a lee-shore. Nothing but the utmost promptitude and expertness on the part of the salvors could

have enabled them to overcome the many difficulties which they had to encounter in bringing the ship to anchor; and to that expertness and promptitude was The Windsor Castle, for the third time that day, indebted for her preservation.

When the ship was anchored, the pilots and fishermen next proceeded to drive out the intruding country people by force. They armed themselves with the handspikes, and, not before it was absolutely necessary, compelled the people to desist from plunder and quit the decks. This part of the service has been treated by the impugnants' counsel as imaginary; but I cannot see any reason to treat the danger as slight, when I find Mr. Baldwin, of the coast-guard, who came aboard next morning with three of his men, at four o'clock, swearing most positively that he considered the salvors to be in extreme danger of their lives from the disposition of the country people. However, this, as well as all other difficulties, was overcome by the steadiness, patience, and sober good sense of this humble body of men, whose conduct in every respect serves as an example of merit under these trying circumstances.

One of the first steps taken by the salvors on anchoring * the ship was, to despatch a messenger to Mr. Burton, of [* 63] Carrigaholt, the nearest justice of the peace, advising him of the transactions of the morning and of the actual position of the ship. Mr. Burton came aboard early in the morning of the 14th, and no doubt his presence, and that of Mr. Baldwin, contributed to prevent the danger of pillage.

The next person who appears on the stage is Captain Triphook, of her Majesty's revenue cutter The Hamilton. This gentleman, hearing of the appearance of the derelict ship on the morning of the 13th, instantly started from the city of Limerick, where his cutter lay, and with much praiseworthy alacrity ran down the river on the night between the 13th and 14th, and discovered The Windsor Castle at her anchor about daybreak of the 14th. He boarded her at seven o'clock that morning. The conduct of the salvors was already the subject of general praise and approbation, and so complete was the acknowledgment of their signal merits—a rare circumstance where power deals with unprotected worth—no one thought of questioning their title as salvors, nor of interrupting their possession of the ship. Captain Triphook wished to join in the salvage, and proposed to use his cutter's services in towing The Windsor Castle up the river. The salvors resisted this proposition, but without rudeness or boisterousness; insisting on their rights as salvors, and firmly maintaining that they were capable of completing the work they had begun, and of bringing the derelict to a safe anchorage without the assistance of

The Windsor Castle. 2 Notes of Cases, Supplement.

any other person whatsoever. The matter was calmly discussed, without any violence on either side. Captain Triphook expressly declared he did not mean to interfere with their rights, but that he thought his duty obliged and entitled him to join in the efforts for the preservation of the ship; that, however, he was ready to assure them his interference could not and should not in any way operate to their prejudice or in diminution of their just claims on foot of salvage. Mr. Burton, the magistrate, now interposed his authority and friendly advice, and at his instance the salvors consented to permit Mr. Triphook to join.

[* 64] * The salvors had got a pilot's hooker from shore, and at the beginning of flood-tide, they weighed the anchor of The Windsor Castle, which was then taken in tow by The Hamilton and hooker.

I will not pursue in detail the transactions of the 14th: it would be unnecessary. The wind died away shortly after they left the place of anchorage; the derelict ship drifted towards the cliffs; The Hamilton and hooker dropped their tow-lines and shifted for themselves. The Windsor Castle was once more in the most imminent peril. She was got off chiefly by the opportune occurrence of a light breeze and the towing of the pilot's canoes. These latter worked then, in conjunction with the hooker and Hamilton, for the space of some miles. At length, about the entrance of Rieniella Bay, the wind again entirely subsided, and the hooker and Hamilton gave up all further attempts. Some miles up the Shannon, a steamer, which had been sent for, appeared in sight. A bargain was made with her to take The Windsor Castle in tow as far as Scatterry Roads for the sum of 20*l*. She did so accordingly, somewhere between Beale Bar and Corless, and at four o'clock in the afternoon the pilots safely moored The Windsor Castle in Scatterry Roads. They had objected, as on former occasions, to the steamer's interference, being justly confident in their own certain means of working out the salvage service: but, with the same temper and moderation which they preserved from the very beginning to the end, they yielded their own opinions to the advice and authority of others.

With respect to Captain Triphook, I do not think that any part of his conduct on this occasion is in the least degree liable to exception; on the contrary, I think his spirit and activity, in getting out to the assistance of the derelict, are highly creditable to him, and that his temper throughout was quite proper and becoming; but I conceive the actual service he rendered was trivial in amount. As to Mr. Baldwin, I do not apprehend that he can be considered a salvor at all. The real and proper salvors, and the only ones whom I can

recognize in this case, are the thirty-five pilots and fishermen who are the parties intervenient. They saved the *ship; [* 65] they brought her to her moorings at Scatterry; they preserved her from plunder; and lastly, they guarded her for several weeks, till her owners claimed her and received possession. For these services the salvors now apply to this court to award a fair and just remuneration, and it is my duty to measure the amount of compensation to which they ought to be held entitled.

The value of The Windsor Castle and her cargo, as agreed upon and admitted in an act of court, is 20,000*l*. The owners have made a tender in the acts to the pilots, and another to Captain Triphook and Mr. Baldwin, who had jointly brought their action as salvors against the vessel. The tender to the pilots was 1,000*l*.; that to Captain Triphook and Mr. Baldwin, 350*l*. Triphook and Baldwin accepted the tender, and discontinued their action; they thus became qualified as witnesses for the impugnants, and have been examined in the cause.

I feel under some difficulty in consequence of the tender and payment to Baldwin and Triphook. Were I to measure the reward due to the fishermen on the same scale of bounty and magnificence as that displayed by the owners in the payment to Triphook, equity would oblige me to value the pilots' services at the amount of one half the net proceeds of the property. But I have been told, and I am disposed to give credit to the statement, that the tender was a hasty and improvident act of generosity, and is not to be drawn into the consideration of the court in order to enhance the liability of the owners. I shall not do so, for the consequences would be, in my apprehension, that I should thereby make a decree substantially unjust, and inflame the losses of the owners beyond what the court would be warranted by the evidence. But, this being the case, I must also, in justice, throw this payment of 350*l*. entirely on the proportion of the property which will remain to the owners. To recognize it as a fair tender, and allow it in abatement of the sum going to the real salvors, would be an inconsistency in the award of the court, unless I raised that award to a proportion which the owners might justly complain of as excessive.

* Now, this is a case of absolute and completely legal de- [* 66] relict. It is a case, too, of the most perfect and incontestable salvage. That one fragment of the ship, or one bale of the goods, is now in existence, is due absolutely and entirely to the salvors. There neither was a human possibility that the ship would be saved without assistance, nor, except the assistance which in fact offered itself, was there any other possible means of escape under the

circumstances. Long before Triphook could have arrived in his cutter, long before the aid of a steamer could have been summoned, The Windsor Castle would have been in pieces on the cliffs of Mall Bay, and her cotton floating on the waves. But even with the opportune assistance the pilots brought, it is further due to the extreme activity and promptitude they displayed that the short and lucky moment was not allowed to slip. They had but half an hour, and they turned it to account. The labor, the perseverance, the expertness of these men deserve high praise, and I have little doubt that, in the course of the morning, they more than once exposed their lives, and would have been willing to lose life, in the enterprise they undertook.

On the other hand, though I were to abate nothing from the substantial merits of the pilots, yet it is also to be observed that the difficulties in the case, though real and great, are not of that striking and affecting description which has often occurred in severe salvage services.

The property, also, is very large, and the condition in life of the pilots will enable me to allot them a just and adequate compensation at a less enormous expense to the owners than would perhaps be decreed in cases where the salvors were found in the wealthy and aristocratic classes of society.

On the whole, I decree to the salvors one fourth of the agreed value of the ship and cargo, being 5,000*l.*, together with their costs and expenses.

[* 67]

* THE WILLIAM BRANDT JUNIOR.

Act on Petition.

July 15, 1842.

An agreement for towage, when, from unavoidable circumstances, an accident occurs to the vessel towed, does not preclude the towing vessel from rendering services to be rewarded as salvage services.

THIS was a claim on the part of the steam-vessel *Copeland*, the master of which had agreed to tow The William Brandt Junior, with a cargo of timber, from the mouth of the river to London. It appeared that, about nine o'clock on the morning of the 14th November, 1841, the steam-tug, being abreast the Nore Light, with her steam up, waiting for any vessel that might require to be towed up, the wind blowing a gale from the N. W., saw and went to The

William Brandt Junior, and the master of the tug agreed to tow the vessel to London, when the weather moderated, for 16*l.*; she was in the meantime to sail up to Sea Reach. The ordinary charge for towing a vessel of that tonnage, (204 tons,) from Gravesend to London, was 16*l.* On arriving at Sea Reach, the wind increased, and The William Brandt Junior, having lost her jib-stay and fore-top-sail yard, missed stays and got upon the sand or mud, called the Blyth Sand. She hailed the steamer, which endeavored to get her off, but without effect that tide. Next tide, she succeeded in towing her off the mud and up to Deptford, where the vessel arrived at two o'clock on the afternoon of the 15th. The parties construed the agreement differently. The salvors alleged that it was to this effect: "that, as soon as the weather had sufficiently moderated, the steamer should take the ship in tow, and tow her up to London, for 16*l.*" The owners denied that this was the agreement, and alleged that no such conversation in respect to the weather took place, and that "it was understood that the ship should *be immediately [* 68] taken in tow." The value of the property was 6,250*l.*, and the action was entered for 650*l.*

JUDGMENT.

DR. LUSHINGTON. The vessel (from no blame of the master of the tug) goes on the sand, and the point to which I must direct my attention is this: is the service afterwards performed under the agreement so generally worded to be included within the limits of the 16*l.*, or something beyond them? The agreement was for towing only. If, in the performance of a salvage service — such towing being honestly, fairly, and skilfully performed — it happens, from inevitable circumstances, over which neither party has any control, that an accident occurs to the vessel taken in tow, and essential services are rendered by the vessel agreeing to tow her from one place to another, I am of opinion that the agreement does not cover such a service. I think I should be laying down a very dangerous doctrine if I were to hold that, where a person agrees to perform the simple duty of towing from the Nore to London, if, from stress of weather, from an accident happening to the ship, or other circumstances of a like nature, it should so happen that other and different services have to be discharged, the original agreement is binding on the parties. The vessel remained on the sand till the tide flowed at night, and then she came off with great facility. I do not think it a service of a very eminent degree of merit, and I think the fact of the tug having been engaged in the service of the vessel tends to diminish the *quantum* of the reward for this extraordinary service. Am I

The William Brandt Junior. 2 Notes of Cases, Supplement.

to consider 16*l*., the original amount agreed upon, as sufficient under these circumstances? I am of a contrary opinion. I think 16*l*. might be a fair reward for a purely towage service; but I think that another service grew upon it, over which the master of the tug had no control, and that he is entitled to be paid for that also. I think the service was not of a high character, and I give 60*l*.

5

CASES

SELECTED FROM VOLUME III.

OF

NOTES OF CASES.

[THE CASES SELECTED ARE THOSE NOT REPORTED IN THE REGULAR REPORTS.]

1844-1845.

NOTES OF CASES.

VOLUME III.

* THE IODINE.

[* 140]

Act on Petition.

June 10, 1844.

Salvage. Commanders, officers, and crews of her Majesty's ships are entitled to the same remuneration for salvage services as other salvors: the risk of the ship and property effecting the salvage, subject to a different consideration.

THIS was a question as to the amount of salvage remuneration to be awarded to the commander, officers, and crew of H. M.'s steam-vessel *Devastation*, for services rendered to the brig *Iodine*, from Odessa to Falmouth, with a cargo of linseed, on the 10th November last, the brig having got upon a shoal off the island of Tenedos. The value of the ship, cargo, and freight, was 5,500*l*. The owners of the cargo made no tender, alleging that the crew of a queen's ship were not entitled to claim a reward for so slight a service. The owners of the ship and freight tendered 100*l*., which the salvors rejected, and entered the action at 1,500*l*.

Addams, D., and *Robertson*, D., for the salvors; *Haggard*, D., and *Robinson*, D., for the owners of the ship and freight; *Sir John Dodson*, Q. A., and *R. Phillimore*, D., for the owners of the cargo.

JUDGMENT.

DR. LUSHINGTON. This suit has been met in a very different manner by the owners of the ship and freight, and the owners of the cargo. The former, whose interest amounts to 2,600*l*., have made a tender of 100*l*., thereby *acknowledging that a ser- [* 141]

vice was rendered, and that some reward was due; whereas the latter have taken a totally different view of the case, and allege that this is not a salvage service at all. Now, true it is that the owners of the cargo cannot be bound by any act done by persons having another interest; yet it is something singular that persons having the same interest in the suit should have taken so totally different a view with regard to it.

Observations have been made in the argument respecting one of her Majesty's vessels preferring a claim of this nature. I thought that question had long ago been settled; for from the very earliest date of my experience as an advocate, as far back as 1808, I thought the opinion expressed by Lord Stowell had decided this question. I apprehend that where assistance is rendered by any vessel belonging to her Majesty, the following principles are to be applied: that where a service is done, and there is personal risk and labor, her Majesty's officers and seamen are entitled to be rewarded precisely in a similar manner, on the same principles, and in the same degree, as where any other persons render that service. But, with regard to the use of the vessel, a different consideration would apply, and a less remuneration would always be made, on account of the vessel being the property of the country, and the property of owners, under these circumstances, never being risked. I am not inclined to depart from the principle I myself advocated in the case of *The Wilsons*,¹ though it was a case in many of its features different from the present, and is barely to be considered apposite, save as to general observations. Certainly I adhere to the opinion pronounced by Sir John Nicholl, in the case of *The Rapid*,² that, where her Majesty's ships claim salvage remuneration, it must be for services of an important character; and, on account of the property of the ship itself, less will be given than where other property is risked.

This brings me to the consideration of the facts; and in order to see how far the principle applies to the facts, of course, [* 142] *the first document to which I look is the instrument signed by the master, which is in these words:—

These are to certify that the brig *Iodine*, of Sunderland, George Mills, master, laden with linseed, shipped by Messrs. Rodocanachi, of Odessa, and bound to Falmouth for orders, having got on shore on a shoal off Tenedos, on the night of the 10th inst., and all our endeavors to get her off proving unsuccessful, was towed off by H. M.'s steam-vessel *Devastation*, and into Basika Bay, where she

¹ 1 W. Rob. 172.

² 3 Hagg. A. R. 419.

anchored us in safety on the 11th inst. Dated at Basika Bay, this 12th day of November, 1843. George Mills, master of the brig Iodine.

Such are the facts stated in this certificate, and how are they met on behalf of the owners of the cargo? Why, the master makes an affidavit, stating that he did not understand the nature of the document he signed, and that Captain Robinson, of The Devastation, made a false representation to him that this document was intended for Lloyd's agents at Constantinople, and not for any other purpose. The answer to this is expressed in the affidavit of Captain Robinson, that he never made any such representation whatever. But be it observed, that Mr. Mills does not deny the facts stated in the certificate to be true; all he contends is, that it was given *alio intuitu*, not to support a claim for salvage in the High Court of Admiralty, but for the purpose of advancing a claim to some remuneration from Lloyd's. It is quite clear that where an explanation of the way in which an instrument of this sort was obtained, is on the one side alleged, and on the other denied, I must take the document itself, as it stands, without regard to the contradictory statements. There is no satisfactory means of ascertaining the truth, when two parties are so directly at variance.

It appears to me that a great deal of discussion has taken place with reference to some of the circumstances, on which it is impossible to come to a satisfactory conclusion. The vessel, on the night of the 10th November, got on a shoal, and on the morning of the 11th she was perceived in difficulty. A boat was sent from The Devastation, lying some miles off, to inquire whether she wanted assistance. In the first instance, this was declined, but it is clear that it was accepted afterwards, to the extent of the men heaving upon the anchor, though it is denied that they assisted in laying [* 143] the anchor out. This was unsuccessful; but it is said, that if a part of the cargo had been unladen into boats, or thrown overboard, the vessel would have been got off. Who can say that would be the case? It all depends on this circumstance, how deeply she was fixed in her position, which it is impossible now to ascertain. Nor does any thing in the subsequent history of the case satisfy my mind how the fact precisely was. Then, according to the statement in the certificate, all the endeavors made to get her off proved unsuccessful, and the master availed himself of the offer of the assistance of The Devastation, and of her great force and power, in order to extricate The Iodine from her perilous position. The extent of the peril it is impossible for any man truly to represent; that depends on circumstances, some of which cannot be investigated with certainty;

and it depends also on the contingency of the weather, which might come on to blow, or there might be a calm. The *Devastation* comes to her assistance, and with her power—namely, 400 horse-power, according to all the statements—the assistance rendered is instantly successful. Does the rapidity with which the assistance of *The Devastation* effected the safety of this vessel show that the danger was either less or more? I apprehend, again, that that is one of those facts of which it is very difficult clearly to see the whole effect. If the vessel was not very closely fixed, in all probability, when the whole force was put on at once, she would come off, as stated by Captain Robinson, as if it were a launch; if she had been more firmly fixed, she would not have come off with the same ease. But be this as it may, she was got off, and if she had remained any longer, it is impossible to say what would have been her fate. Her is a property of 5,500*l.* brought out of a state of jeopardy, more or less, whatever it may be, and ultimately comes in perfect safety to this country. I think it is of no importance whether the vessel received more or less damage. According to the statement in the protest, the master says she was perfectly tight before, and she came to this country, after a long voyage of ninety days, without making water. I think, again, that that is of no importance, because [* 144] it only shows that she did strike without damage.

If it had been a hard rock, it would have been a different consideration; but the master himself states that it was a shoal.

I am of opinion that this is a case in which the salvors are fairly entitled to some recompense. I agree in the opinion which has been formed by the owners of the ship as to the extent of that recompense. I widely disagree with the argument which has been employed on behalf of the owners of the cargo, and I should lay down what I consider to be a new position, if I pronounced against the claim for salvage, and held that it was a duty incumbent upon her Majesty's steam-vessels to render important services of this description without any remuneration at all. I believe if I were to lay down any such rule, no greater mischief could be done to the shipping interests of this country; for, if no reward were to be paid for services of this description, of necessity, so long as human nature remains human nature, there would be an indisposition on the part of such vessels to undertake the rescue of British merchantmen in distress. But it is not to be carried to an exorbitant extent. Captain Robinson and the crew of *The Devastation* ought to have accepted the tender made on behalf of the ship and freight; I think it was a sufficient and liberal tender, and I do not think that I should do justice or my duty to the owners, unless I condemned the salvors in their costs from the time

the tender was made. I wish to encourage liberal tenders. I think it would be most beneficial if, in these cases, the owners could be induced to come forward and make a fitting and proper proposition for the benefit of the salvors. With regard to the owners of the cargo, I think that, if the salvors took a very unjustifiable view of the extent of the reward when they entered an action for 1,500*l.*, the owners of the cargo have failed in showing that no service was rendered and no remuneration ought to be paid. I shall decree against them, according to the value of the cargo, the same proportion as 100*l.* bears to the ship and freight, and condemn the owners of the cargo in the costs.

Proctors:—*Nelson*, for the salvors; *Bowdler*, for the owners of the ship; and *F. Clarkson*, for the owners of the cargo.

*THE BOLINA.

[* 208]

Act on Petition.

June 29, 1844.

Collision. Where there is no *prima facie* case of negligence and want of seamanship, the *onus* does not necessarily attach to the party proceeded against, alleging inevitable accident, to prove it, but on the party seeking indemnification to prove that blame attaches to the other party.

THE *Neptune*, a brig of 165 tons, coal-laden, on the 17th October, was forced by a heavy gale from the E. N. E., with many other vessels, (about 150,) to seek protection in the Humber, where she was brought to anchor, in a proper position, with a light over her side. The *Bolina*, a vessel of the same size, but in ballast, entered the river during the night, and came in collision with The *Neptune*, doing the damage sought to be recovered. The owners of The *Bolina* denied that theirs was the vessel that had done the damage, and alleged that, if it * was, the collision had arisen from inevi- [* 209] table accident, owing to the weather and the darkness of the night.

The COURT was assisted by Trinity Masters.¹

¹ Captain Hayman and Captain Ellerby.

PER CURIAM.

There are two questions in this case: first, as to the identity of the vessel; secondly, assuming the identity, whether the blame is imputable to The Bolina. The most convenient mode of arguing the case is, first, to assume the identity, and inquire whether the collision arose from the fault of The Bolina.

Sir J. Dodson, Q. A., for the owners of The Neptune. No blame can be imputed to our vessel, which was anchored in a proper position. We hailed The Bolina, notwithstanding which, she came right upon The Neptune. If the same caution had been used, as by the other vessels in coming into the Humber, she would have avoided the collision.

H. Nicholl, D., on the same side. The excuse of inevitable accident ought always to be narrowly watched. The Bolina was entering the Humber on a night when a gale had obliged many other vessels to do so, and she ought to have been most particularly careful.

Addams, D., for The Bolina, stopped by the court.

JUDGMENT.

DR. LUSHINGTON. The gentlemen by whom I am assisted are of the same opinion as I am, namely, that there is no proof whatever,—assuming the identity to be established, and that The Bolina was the vessel which came in contact with The Neptune,—that the damage arose in any manner from neglect or want of seamanship on the part of The Bolina. In consequence of the inclemency of the weather, a great many vessels were compelled to take refuge in the Humber, endeavoring to get into a place of safety with as much expedition as was possible. It is not denied that several other collisions took place in the course of the night; that it was a dark night rendering it exceedingly difficult for vessels to perceive each other at any distance, and to escape collision, in consequence of the state of the wind and weather. Under these circumstances, The [* 210] Bolina, in coming * in, (assuming that she was the vessel) came in contact with The Neptune, and the Trinity Masters are of opinion, as well as I, that there is no proof that the collision arose from any absence of due care and caution, or from the want of seamanship, on board The Bolina. With regard to inevitable accident, the *onus* lies on those who bring a complaint against a vessel, and who seek to be indemnified,—on them is the *onus* of

The Soegutten. 3 Notes of Cases.

proving that the blame does attach upon the vessel proceeded against; the *onus* of proving inevitable accident does not necessarily attach to that vessel; it is only necessary when you show a *prima facie* case of negligence and want of due seamanship. Under the circumstances, I have no hesitation in pronouncing against the claim.

Proctors: — *Smale*, for The Neptune; *F. Clarkson*, for The Bolina.

• THE SOEGUTTEN.

[* 270]

Motion.

August 7, 1844.

Practice. Where a party is condemned in costs, which have been regularly taxed, and paid, the court will not entertain a motion for reconsidering the taxation.

THIS was originally an action by certain boatmen of Winterton, to recover a remuneration for salvage services rendered to The Soegutten, a Swedish sloop, of 66 tons, laden with barley, for London, for which services the owners had tendered 35*l.*, the salvors entering their action at 120*l.* The court (June 29) held the tender to be, under the circumstances, most ample, and condemned the salvors in the costs from the time of the tender being made in acts of court. The proctor for the salvors acknowledged the receipt of the balance of the salvage and costs, but the salvors, thinking that there were items in the owner's bill of costs which should not have been allowed to be included therein, lodged a *caveat* in the registry, against the amount of the bill being paid, but the registrar paid out the money.

Haggard, D., on behalf of the salvors, moved that the registrar be directed to reconsider the taxation of the costs.

Addams, D., for the owner.—The whole matter is finally disposed of; the money is paid. The court cannot permit the matter to be ripped up again against the foreign owner.

JUDGMENT.

DR. LUSHINGTON. It is impossible that I can form any judgment as to these costs. The registrar has seen the bill. The principle is clear: when I condemn a party in the costs incurred subsequent to

The *Eugenie*. 3 Notes of Cases.

the tender, I cannot know what those costs are; but the course is to send it to the registrar, in the first instance, and if there is any objection to his report, it must come before the court in an intelligible form. I cannot understand it now, and if I am to come to any decision in the matter, I must have the means of forming a judgment.

The Registrar. Both proctors attended in the registry, and all the facts were fully considered. I made no report, but the case [* 271] was considered as settled. A *caveat* is of no avail in the Court of Admiralty further than as a notice to the other proctor.

PER CURIAM. I cannot go further; I can make no order.

Proctors:—*F. Dyke*, for the salvors; *Wadeson*, for the owner.

[* 430]

* THE EUGENIE.

Act on Petition.

November 23, 1844.

Salvage. Under what circumstances the ignorance of the master of the vessel (foreign English) of the locality is an ingredient in calculating the rate of salvage.

In this case, a French brig, named *The Eugenie*, bound from Malaga (which she left 2d May) to St. Petersburg, with wine and oil on the morning of the 7th June, was in the Bristol Channel, the master having lost his course, and being ignorant of the locality. At the entrance of Carmarthen Bay, a boat, employed in fishing, came up, and a man was put on board, under whose direction the vessel was navigated to Tenby Roads. The wind was blowing strong from the S. S. W., and a flag was flying at the brig's gaff-end. The value of the ship and cargo was 3,000*l.* A tender of 5*l.* was refused by the salvors, who entered an action for 150*l.*

[* 431] *Haggard*, D., and *Twiss*, D., for the salvors, urged the danger of the vessel (the head-sails of which had been blown away,) from a lee-shore, on a dangerous coast, and the master's ignorance of the locality, who acknowledged, when he made Wexham-head, on the morning of the 7th of June, that he did not know where he was.

Jenner, D., and H. Nicholl, D., for the foreign owner, contended that the vessel was in no danger; that the master only wanted a pilot, which was the object of the signal, and that the salvors should be condemned in the costs. As to the master's ignorance of the locality, cited *The Vrouw Margaretha*.¹

JUDGMENT.

DR. LUSHINGTON (after detailing the facts) observed:— It has been argued, on the part of the salvors, that the ignorance of the master, as to the locality, is an ingredient which ought to augment the scale of salvage remuneration, and Dr. Nicholl has referred to a case in Sir C. Robinson's Reports, in which Lord Stowell said, with reference to the circumstances of that case, that the ignorance of a foreign master was not a ground for augmenting the rate of salvage. Now, that expression must be taken always with reference to the particular circumstances of that case. The ignorance of a foreign master, where nothing is required but the simple assistance of a pilot, would not tend to augment the rate of salvage; neither would the ignorance of an English master, because it is the business of a pilot to supply any deficiency of the master's knowledge. But ignorance of the locality, under other circumstances, is not an unimportant matter for consideration; because, when the question is, what would be the probable fate of a vessel, if compelled to keep at sea, the master being in entire ignorance of the dangers with which she was beset, then, undoubtedly, the ignorance of the persons on board adds to all the ordinary and natural perils in which the vessel would be placed. I cannot, therefore, entirely leave out of consideration the French master's ignorance of the locality, and that, by some misfortune, he had got out of the course he intended to pursue. Nor was he *navigating a vessel in a perfectly complete state; for, [*432] though he was not in immediate danger, though the wind and weather did not induce him to apprehend danger, yet we must look to what might have been her condition unless assistance had been rendered in due time. With respect to the sails, they were not in a state of efficiency, for the master was desirous of having them repaired; and if he had thought himself well fitted with sails, he would not have had any wish to repair them. I think, therefore, that though it was not a case of immediate danger, the vessel might have been exposed to some degree of difficulty from the master's want of knowledge of the locality. It was at a period of the year

¹ 4 C. Rob. 103.

The Ranger. 3 Notes of Cases.

when, generally speaking, danger is not apprehended from the weather. Nobody denies that every thing that was done by the salvors was done fairly and properly, with due skill and with sufficient activity, and the vessel was brought to a place of safety. Now, I cannot consider this as a service of any great importance; for, though it is not simple pilotage, I consider it very little beyond pilotage. On the other hand, the persons who boarded the vessel were not pilots, and no duty was consequently imposed upon them; they quitted their occupation, and are entitled to be fairly indemnified for any loss of profits. I am of opinion that 12*l.* will be an ample reward; and of course I must give their costs to the salvors. Had I been of opinion that there was a sufficient tender, I should have given the owner his costs.

Proctors:— *Tebbs*, for the salvors; *Jennings*, for the owner.

[* 589]

* THE RANGER.

Act on Petition.

February 4, 1845.

Salvage. Where a vessel got into danger, through negligence, and the parties claiming salvage proceeded, at some risk, to her assistance, having good reason to believe she would require it, but the danger was over when they reached the vessel;—Held, that no salvage remuneration could be awarded, which can be given only for assistance actually rendered to the vessel proceeded against.

THE brig *Ranger*, from London to Stockton-upon-Tees, on the 7th of October, about 10 A. M., was observed in the vicinity of the Halesborough Sand, off the coast of Norfolk (which she once actually touched); whereupon the fishing lugger *Samaritan* put off to her assistance, considering the brig to be in a dangerous situation, and that the persons on board, from the motions of the vessel, were ignorant of their danger. The fishermen did not board the brig, owing to the state of the weather; but, as they alleged, they hailed her, and gave directions by which she was extricated from her peril. It was not denied that *The Ranger* was in a state of danger when she touched the sand, nor that there was merit in the lugger in hastening to her assistance; but (as the court suggested at the outset) the question was, whether the lugger came up in time to render assistance, or whether the brig was in a state of safety at the time it came up.

The court (at its own suggestion) was assisted by Trinity Masters.¹

* *Jenner, D., and H. Nicholl, D., for the salvors; Sir John [* 590] Dodson, Q. A., and R. Phillimore, D., for the owners.*

JUDGMENT.

DR. LUSHINGTON. In all these cases, the first consideration is, whether any salvage service has actually been rendered by the party who claims a reward. If any salvage service has been rendered, it may be that persons who have exerted themselves to accomplish the service, though they were not so fortunate as to come up in time, may be let in collaterally to a share. But I am not aware of any case in which, however meritorious the exertion or great the risk, this court has taken upon itself to award any remuneration, unless actual assistance was conferred upon the party proceeded against. It is not a question whether, at any time, there was danger or not; it is not a question whether the salvors risked their property and their lives; but the foundation of the jurisdiction and authority of the court is, a service actually rendered. Taking this view of the case, I was induced, at the commencement of the argument, to state to the counsel the real issue to be determined, namely, assuming the facts alleged by the salvors, whether they arrived at a period of time to enable them to afford beneficial assistance to the vessel proceeded against.

We are of opinion that *The Ranger* was in danger when she struck upon the sand; that the danger was at an end when she got into deep water; that the people in the lugger had good reason to believe that *The Ranger* would require assistance; that they ran some risk in crossing the sand to render assistance; but that the danger was over before the lugger reached *The Ranger*. It is not necessary to enter into all the particulars of the evidence which have led us to this result. It is the opinion of the Trinity Masters, looking at all the facts of the case, that *The Ranger* was free from the sand before the lugger approached to render any assistance; and if so free from the sand, it is clear, from the other facts of the case, that nothing was required at the hands of the lugger, for it is an admitted fact, that there were on board *The Ranger* two persons competent to direct her *course in a proper direction, [* 591] namely, the mate and Mr. Darvell, the master of another vessel.

¹ Captain Hayman and Captain Farquharson.

The Ranger. 3 Notes of Cases.

It being so, it is impossible that the court can pronounce for any salvage remuneration; but when I consider that it was by nothing less than negligence on the part of those on board *The Ranger*, that the vessel was brought into the difficulty in which she was placed, and which difficulty it was that occasioned the people in the lugger to run the possible risk of the lugger and the lives of those on board: though this is not a sufficient ground for awarding a salvage remuneration,—for there can be no salvage remuneration awarded where no salvage service has been performed,—it is ample enough, not only to justify, but to require, that the expenses of the lugger should be paid by the owners of *The Ranger*.

Proctors:—*Jenner*, for the alleged salvors; *Glennie*, for the owners.

CASES

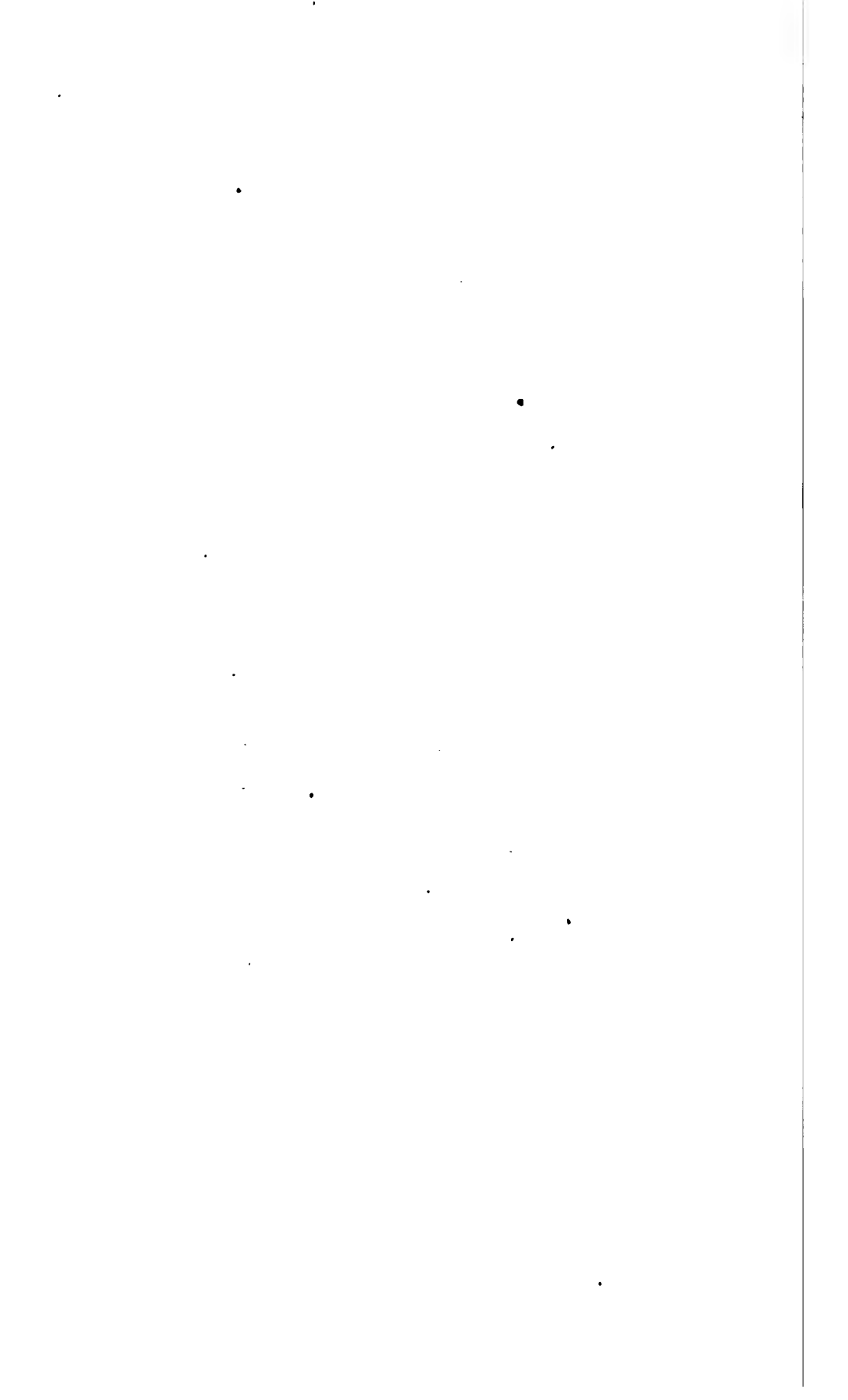
SELECTED FROM VOLUME IV.

OF

NOTES OF CASES.

[THE CASES SELECTED ARE THOSE NOT REPORTED IN THE REGULAR REPORTS.]

1845-1846.



NOTES OF CASES.

VOLUME IV.

* THE CITY OF LONDON.

[* 40]

Act on Petition.

April 24, 1845.

Collision. Construction of Trinity House Rule and its application to sailing vessels.

THE Spring, a collier snow, in ballast, bound to the north, with the wind W. to W. S. W., (blowing a stiff breeze,) and the tide in her favor, about two o'clock in the morning of the 10th November, came in collision, off the coast of Suffolk, with The City of London, a steam-packet, belonging to the Aberdeen Company, bound from Aberdeen to London, heavily laden; and the effect of the collision was, that the snow went down, and one of her crew was drowned. As the course of The Spring was N. E. and by N., she was going free; on the other hand, the steamer, the course of which was S. W. and by W., had both wind and tide against her. The night was dark and cloudy. On behalf of The Spring, it was stated that she discovered the steamer one point on her larboard bow, and the people on board The City of London admitted they saw The Spring right ahead; both vessels were coming on at a very rapid rate. In this state of the facts, the questions were, what was the duty of each vessel to do, and what was actually done.

The court was assisted by Trinity Masters.¹

¹ Captain Probyn and Captain Locke.

Addams, D., for The Spring. The snow kept her course, and it is admitted that, if she did so, and did not starboard her helm, there should have been no collision; therefore, on the showing of The City of London, (which had previously had a collision with another vessel, and lost her mizen mast,) she must have been to blame. If she had kept her course, there would have been no collision.

H. Nicholl, D., on the same side.

Sir John Dodson, Q. A., for The City of London. It was the duty of The Spring, according to the Trinity House rule, to have ported her helm, which is not alleged to have been done; [* 41] but we say she starboarded. We ported *our helm, and she struck us, coming stem on, but rather with her starboard bow, on our larboard bow.

R. Phillimore, D., on the same side.

DR. LUSHINGTON (addressing the Trinity Masters). A great deal of reference has been made, in this case, to the rule which has been laid down under the authority of the Trinity House.¹ Now I am bound to say, as I have had occasion to say before, that this rule does not directly apply to the case of a steamer and a sailing vessel meeting each other; in point of fact, this rule is directed solely to the navigation of steam-vessels, and it applies simply to steamers meeting each other. It was intended, no doubt, to embrace the point of a steamer meeting a sailing vessel; but, whatever was the intention, the rule is wholly silent as to merchant vessels; and, moreover, it is not only silent as to merchant vessels, but it is totally silent as to what the master of a merchant vessel ought to do. Now I am bound to tell you that, from this rule, so framed, I cannot put it to you to declare whether it has been violated or not, because I am of opinion that the rule itself, and especially in the regulating part of it, does not apply to this case at all. But it does not follow that, because the rule itself was so laid down, that you may not apply it to the circumstances of this individual case, the ordinary rules of navigation do not apply, and that the spirit of the order may not be, in other words, exactly those principles you would have applied, supposing this order had never been issued at all.

Now, I am going to submit this proposition: looking,—wholly

¹ See the Rule, 2 W. Rob. 488.

independent of this order,—at what was the ancient and the continued practice, in respect to vessels meeting at sea; what the vessels ought to have done, and what they ought not to have done. Observe, you state as a recognized rule, (not giving authority directly through the medium of this paper, but as a recognized rule, that which has always prevailed as a rule and principle in navigation,) that “when both vessels have the wind large, or a-beam, *and [*42] meet, they should pass each other in the same way, on the larboard hand; to effect which the helm must be put to port.” Now, a steamer is always to be considered, as I have understood, a vessel having the wind large; and, with regard to this vessel, (The Spring,) there cannot be a doubt that she had equally the wind large at that time; and with the wind free, if she had met a merchant vessel, it would have been her duty—supposing both vessels to have been going large—to have put her helm to port. Now is it not one and the same thing whether this vessel, The Spring, had met a merchant vessel sailing with the wind free, or had met a steamer; and does not the principle equally apply, and was it not equally her duty to put her helm to port, if the circumstances of the case rendered the principle applicable? That the circumstances of the case rendered the principle applicable, I entertain not one shadow of doubt. I have had occasion, over and over again, to say in this court, and I will endeavor to put it in the clearest language I can command, that whenever two vessels meet at sea, and there is any probable chance whatever of collision, it is their duty to abide by the principles of navigation, and each of them to take the precaution of putting the helm to port, where both are free, so as to avoid the chance of accident; and for this obvious and plain reason: that, in a dark night like this, how often must it happen that some doubt will arise whether the vessel be direct ahead, or one point to the starboard or to the larboard? And are you to leave to mere chance the discovering this with perfect accuracy; or are you not immediately to adopt that which is the only safe precaution; that is, following out the principle of the order, putting the helm to port at once, and so avoiding the collision? I have been told that this rule is not applicable, because, if the two vessels had kept on their course, they would have run no risk of collision. Why, no one would take upon himself to say that the rule is applicable in such a case. If the two vessels had been six or eight points away from each other, no one would say you are to go across, and thereby occasion a collision; but the principle of the rule is, that when there is a reasonable chance of collision, then you are to adopt, *not the rule, but the principle [*43] on which the rule is founded.

If that is the state of the case, what was the duty of these two vessels, when they met under the circumstances stated? Why, I apprehend for both of them to have put their helm to port. It is admitted that the steamer did put her helm to port, and so acted in accordance with, if not within the terms of, the rule — that she acted on the sound principles of navigation. But what did the other vessel do? Why, according to her own statement, she did nothing at all; but, according to the statement of the steamer, she must have starboarded her helm, and gone to the north; she must have starboarded her helm three points and a half. Whether she did so or not is of no importance, and I tell you my reason: the steamer did, so far as I can understand it, that which she ought to have done; and if The Spring did not put her helm to port, she omitted to do that which she ought to have done; or if she put it to starboard, she did that which she ought not to have done; the one is a case of negligence, the other of misconduct; in my opinion, making no difference whatever in the result of this case. I have stated fully my opinion upon the bearing of this rule, and the principle that I think ought to be adopted. Of course, my judgment never can be put, for a single moment, in comparison with yours, and I shall now be glad to hear your opinion.

CAPTAIN PROBYN. When the steamer saw The Spring approaching in an opposite direction, she immediately ported her helm, as she ought to have done; had The Spring done the same, no collision would have occurred.

JUDGMENT.

DR. LUSHINGTON. I pronounce against the claim, with costs.

[* 144]

* THE SARAH BELL.

Act on Petition.

May 24, 1845.

Salvage. In a case of derelict *de facto*, what is meant by *spes recuperandi*.

THE vessel proceeded against in this case, whilst on a voyage from the coast of Sussex to that of Northumberland, in ballast, on the

13th January, 1845, got upon the Hasborough Sand, well known to be of a dangerous character, the wind being at the *time S. S. E. The vessel was water-logged; and the [*145] master and crew, much alarmed, in order to save their lives, took to their boat, and rowed to the Hasborough Light vessel, three or four miles distant. Two yawls from the shore, containing twenty-five men, proceeded to the vessel. On the arrival of the first yawl, containing eleven men, about seven or eight o'clock in the morning of the 14th, they found the vessel "afloat on the sand, water-logged, with upwards of five feet water in her hold; she had lost her rudder, and her mainsail was lowered down on the deck, with the body of the sail over the starboard quarter, and washing overboard; the top-sail was also lowered down on the cap, the other sails were dashing about, and the larboard anchor was swinging about under the ship's bows, at the water's edge, and in great danger of holeing her." The salvors got the vessel from the sand, and, the wind preventing them from carrying her to Yarmouth, took her into Blakeney harbor. The value of the vessel was 720*l.*; the owners had tendered 200*l.*

Sir J. Dodson, Q. A., and Robinson, D., for the salvors. This is a clear case of derelict, and there is no charge of misconduct against the salvors.

Phillimore, A. A., for the owners. Although the master and crew had left the vessel, it was not quitted *sine spe recuperandi*; whilst in the Light vessel, they were on the watch to regain their ship, and when they saw the vessel, next morning, floating off the sand, they rowed after her, but were too late.

Bayford, D., on the same side.

JUDGMENT.

DR. LUSHINGTON. In cases of derelict, it has long been the practice of this court to take into consideration the whole of the facts,—the degree of danger the vessel was exposed to; the probability of her being otherwise salved; the number of men employed in the service, and the degree of risk and labor they encountered in performing it. With respect to the state of this vessel, there does not seem to be any dispute or doubt as to the facts. The vessel had been abandoned by the master and crew whilst she was lying on *the Hasborough Sand,—notoriously an extremely danger- [*146] ous sand.

Looking at the season of the year, and at the period of time when

the salvors came up to the vessel, it is scarcely possible to conceive that a ship could be in much greater danger of being utterly lost. With respect to the conduct of the master and crew, in quitting the vessel, I think it cannot be doubted that they were perfectly justified in so doing, for the sake of saving their lives; for they were, at a tempestuous season of the year, in a vessel fixed on the Hasbrough Sand, and, as they themselves represent, "in great alarm for their lives," and it was an alarm perfectly reasonable and justifiable. Now with respect to the *spes recuperandi*, at the time they quitted the vessel, I think they could not rationally have entertained much hope of returning to her; they quitted her because they expected that their lives would be lost if they remained,—not because of any temporary danger, which might pass away, and they might have an opportunity of regaining her; but they quitted her because the vessel was lying fast in the sand, and for the sake of saving their lives. But it is said that, after they got on board the Light vessel, their expectations and view of the circumstances changed, and an affidavit has been made by the mate of the Light vessel, in which he swears to his belief that the vessel would have come off the sand. It may have been so; but when we speak of the *spes recuperandi*, we mean the hope and expectation entertained by the master and crew of returning to their vessel; not what was the precise state of things, but what was the intention by which they were actuated at the time. Now the protest says: "The appearer was informed by the crew of the Light vessel that the ship would not come off the sand." Whether this was a mistake or not on the part of the master, is not of the slightest importance; for, assuming it to have been a mistake, his mind was actuated thereby, and the *spes recuperandi* must be governed by the feelings of the individual's own mind at the time. But, after all, suppose he did entertain a *spes recuperandi*, an expectation of getting back to the vessel,—which means, in other words, "if the

[* 147] * state of things becomes entirely changed and the danger is over, then, if I have an opportunity, I will go back to the vessel, and endeavor to bring her to a place of safety,"—and presuming that he did go back, he had a crew of only eight persons. But it appears that the vessel had five feet water in her hold at the time, and it is sworn that the eleven persons who first went on board were incapable of keeping the water under, and when the whole twenty-five persons were on board, it was only with great difficulty they succeeded in keeping it under during the voyage from Hasbrough Sand to Blakeney. I am of opinion, first, that the danger to the vessel was exceedingly great; secondly, that there was no reasonable chance of the master and crew ever recovering the vessel from the extreme peril she was in.

In derelict cases—as I conceive this to be—it has been uniformly and properly the course to give more than in ordinary salvage cases; but it proceeds on the very same principle as in salvage cases, namely, the danger of the property, and nothing else. I think 200*l.* is not a sufficient tender, under the circumstances, and I add to it 60*l.*

* THE MARY ANN.

[* 376]

Act on Petition.

January 13, 1846.

Bottomry. Where the question, bottomry or no bottomry, was embarrassed by deficiency of evidence, complicated accounts, and contradictory affidavits of the master, the validity of the bond sustained upon legal presumptions resulting from the averments and evidence on both sides. What is meant by the “sacred character” of bottomry bonds. How far an intermediate voyage affects the validity of a bottomry bond, especially where it covers expenses incurred before such voyage, and is dated after its completion. Definition of an “intermediate voyage.” Right of mortgagees to impeach the validity of a bottomry bond.

THIS was a suit by Messrs. Goad and Rigg, the holders of a bottomry bond, against the brig *Mary Ann*, and against certain parties claiming to be mortgagees in possession of the ship, and also against other parties claiming under a charter-party. The owner had become bankrupt; the ship had been sold under a decree of this court, and the proceeds, amounting to 1,084*l.* 10*s.* 6*d.*, had been brought into the registry, as well as the freight, 670*l.* 16*s.* 2*d.*, making together, 1,755*l.* 6*s.* 6*d.* Out of this sum wages had been paid to the amount of 302*l.* 3*s.* 4*d.*, leaving a balance in the registry of 1,453*l.* 3*s.* 2*d.*, subject to other claims for wages and pilotage. This amount was insufficient to discharge the various liens upon it, including, besides the bottomry bond, a bond in vendition, for 450*l.* executed at Yarmouth early in 1843. These conflicting claims involved the case in some confusion. The present question was as to the validity of the bottomry bond, which was given at Buenos Ayres, (where the vessel had sustained considerable damage,) upon the ship, for 667*l.* 16*s.* 4*d.*, the premium being 25 per cent. In opposition to the bond, it was contended that Messrs. Dowse, at Buenos Ayres, to whom the bond had been given, had advanced the money as consignees and agents of the owners or charterers, on personal credit, without the contemplation of a bottomry bond, which was an after-thought. The case was embarrassed not only by complicated accounts, but by

the fact that, in her long continuance abroad, from July, 1843, to September, 1844, the vessel performed some intermediate voyages, which raised a novel question of bottomry law, namely, whether the bond was not invalid, by reason of its covering, as it was alleged to do, disbursements in such intermediate voyages.

As the substance of the pleadings is given in the judgment, it is superfluous to set forth the contents of the long act in this place.

Addams and Curteis, D. D., in support of the bond.

Haggard and Harding, D. D., for the parties interested in the proceeds, contended that the bond was bad not only because it [* 377] was not founded upon a purely bottomry transaction, * but because it covered disbursements in an intermediate voyage: citing *The Lochiel*,¹ and *The Reliance*.²

PER CURIAM.

I must take time to consider before I give my ultimate judgment in this case; but I may observe that the case is very scantily instructed, and that there are various difficulties in it.

JUDGMENT.

DR. LUSHINGTON. When I declared my intention to take time to consider this case, I shortly adverted to some of the difficulties which presented themselves to my mind in the course of the argument. Those difficulties arose entirely from the absence of evidence, of that evidence which the court was and is of opinion ought to have been furnished in this case. It frequently happens that, even where all proper evidence is supplied, the court may, amidst conflicting statements, experience some difficulty in ascertaining important facts: but in such cases there are materials for comparison and consideration, which, if examined and sifted with due care and labor, afford, it is to be hoped, in ordinary cases, the means of doing justice. But, in a case like the present, not of conflicting evidence — save that one witness contradicts himself — but of the absence of evidence, the court is deprived of all the most safe and effectual means for forming a sound judgment.

Now, what is the principle which the court is bound to resort to under such circumstances? I apprehend, to adopt for its guidance such presumptions as the law dictates shall be deemed to arise from

¹ 2 W. Rob. 34.

² 3 Hagg. A. R. 74.

the deficiency of evidence unaccounted for. This, indeed, is a proposition which it is easy to state, and which none, I conceive, would be disposed to gainsay; but the principle is by no means one of easy application, and especially not in proceedings by act on petition, which, for various reasons, are instructed with evidence not of that strict character which belongs to suits otherwise conducted. The task, then, is this: not only to discover the ordinary legal presumptions, but the legal presumptions applicable to this very peculiar class of proceedings — *certainly not a very easy [* 378] undertaking — and however that task may be discharged, attended with this further evil, that, if such a case travel to the Superior Court, the principle of requiring the best evidence, and presuming against the party not producing it, may be applied with much greater strictness than we, who, in this court, are daily conversant with this peculiar mode of proceeding, should think could be safely and beneficially done.

I have made these observations that the parties and their counsel may clearly see and understand the course I pursue in coming to my decision; not, as I hope, avoiding any real difficulty which may occur in the case, nor, on the other hand, raising up for discussion points which do not belong to it; and I have done so, also, with the hope that, in future, cases may not come for decision upon materials so slight and frail as those upon which I have now to rely.

In this, as in many, I might say almost all, other cases, reference has been made to the principles which ought to be adhered to in the investigation of bottomry cases; and to the expression, so often used by Lord Stowell, when he expatiated on what he termed the "sacred character" of these bonds. It is certainly very desirable to have a clear and distinct notion of the true import and effect of every remarkable expression which fell from the lips of that most distinguished judge, and still more necessary where his doctrines are to be applied, in constant practice, to a subject so important as bottomry. But the whole of this matter I considered in the case of *The Vibilia*,¹ and I know not that I can add to my former observations. I will only repeat that which is necessary in order to keep up the chain of reasoning as to the principles which I think Lord Stowell intended to act upon, and which form the rule of my conduct. I then used words to this effect, "that every obligation, legally entered into, is of a sacred character; that all legal contracts are entitled to be fulfilled with good faith, and that I have great difficulty in saying that there

¹ 1 W. Rob. 1.

is any thing in the peculiar form or even nature of a bottomry contract, * which can, in this view, confer upon it any peculiar sanctity." A more extensive remedy, or more ample means of obtaining payment, we all know, cannot easily be given; for it is of the very nature of bottomry that the security should, save as to the master, (which is more nominal than real,) be limited to the property hypothecated: I should not use the expression "limited," but "extended." A bottomry bond is not more binding or sacred, in the sense of obligation, than any other instrument or contract. But the difference, as I conceive, is this — that, when the execution is either proved or admitted, it is much more difficult of impeachment. I think the reasons for the establishment and the maintenance of this doctrine are most clear. Consider who are the parties to a bottomry bond. The lender and the borrower, that is the master, who is the agent of the owners, the appointee of the owners, except in some peculiar cases, and on whom the public maritime law of the whole civilized world confers the power of binding the property in cases of necessity. The master receives the money, or sees to its appropriation, and he is best cognizant of the facts which render a loan on bottomry necessary. The instrument must state all that is necessary to constitute a bottomry bond; it is signed by the master, who thereby pledges himself to the truth of the facts therein stated. Again; the circumstances always occur in a foreign, often distant, country; and, above all, a bottomry bond is negotiable like a bill of exchange. I am of opinion, looking at all these facts, that a bottomry bond, duly executed and in due form, is thus far, and thus far only, a sacred instrument, that the legal presumption is in favor of its validity; that the *onus probandi* is in a great measure thrown on the party seeking to impeach, it; that he must prove his case in the same way that a man, admitting his signature to an ordinary bond, must prove its invalidity, or that he has discharged it. The presumption is in favor of the validity and against the discharge, and still stronger in the case of a bottomry bond, where the holder may know nothing of the original circumstances, or, if he be the actual lender, may have to furnish proofs from a distant

[* 380] country. The very * nature of a negotiable instrument imports that it is *prima facie*, and ordinarily, till the contrary be proved, a valid instrument.

One of the main questions in the present case will be, whether these principles are fairly applicable to it, and to what extent. This may be difficult; but still, it is something to have a sound general principle, instead of having to work a result out of particular circumstances, without any beacon to guide the judgment.

Another question will arise in this case, respecting which I think some preliminary observations are expedient. I advert to bottomry where the vessel has been engaged in one or more intermediate voyages. Now, if we are to discuss this question, we must have a clear notion of what an intermediate voyage is; and I confess I have great difficulty in defining what an intermediate voyage is, in the sense in which it has been urged against the validity of this bond, except it be a voyage not in the contemplation of the owners when the vessel leaves its port. A vessel may sail from London for Calcutta, thence with orders to proceed to New South Wales, and then back to Calcutta, or Bombay, or the Cape, to bring another cargo. These are separate parts of one adventure, whatever name be applied to them. I apprehend a bottomry bond might be given at Calcutta to run the risk of one or more of these voyages. In one sense of the word, even the return of a ship to the country from which she sailed may not be the completion of the adventure, as where a vessel is to call at Cork or Cowes for orders, and may, according to the original instructions, be sent on to a foreign port to discharge her cargo. This, also, is a legitimate case for bottomry. It appears to me, therefore, that bottomry may legally take place whenever a ship is in the execution of the intentions of the owners, declared by them, or to be inferred from the facts: I say, expressly declared by the owners by any instrument, or where such consent is to be inferred from the facts; and this, whether the voyages are called intermediate or by any other name. I am not aware that I have ever expressed any opinion in the slightest degree militating against this sentiment, which is in unison with the principles on which all bottomry is founded. I have expressed an opinion, as my [*381] predecessors have done, against bottomry bonds, taken where the master employs a ship according to his own whim and pleasure, without any authority, direct or implied, of the owners, and where the person with whom he negotiates may be reasonably supposed to know that he had no such authority. When we speak of bottomry, we all know that it derives its origin from antiquity so remote, that its commencement cannot be ascertained; but the principle has been, is, and always will and must and ought to be, the same,—to assist the necessities of navigation, and afford facility to the exigencies of commerce. It is true that, in ancient times, voyages were more simple than they are now, and it might be more usual to take a cargo from one port and bring one to the original port of shipment; but now that the course of commerce has changed, and adventures are more complicated, involving separate voyages, the same principles of necessity and commercial advantage equally

apply. Then I affirm this proposition; that a bottomry bond may be valid, whatever number of voyages the adventure may include, provided such voyages be in the legal or *de facto* contemplation of the owners. Be it remembered, however, (for it is necessary that I should express myself with caution,) that I do not affirm or negative the validity of a bottomry bond, taken where a voyage is ingrafted without the knowledge, and not in the contemplation, of the owners and beyond the scope of the master's ordinary authority. I lay down no rule, and I give no opinion upon such a case; I can conceive circumstances which would render the decision very difficult, and I believe no such case has ever yet occurred, and to anticipate one would be the height of imprudence.

It now becomes my duty carefully to examine the pleadings and evidence in this case, that I may arrive at something like a *conspectus* of the facts to which I may apply the principles I have stated. Here the difficulty arises, as in all these cases, not so much with regard to the law as to the facts. The parties are Messrs. Goad and Bignall

who commenced the suit as the legal holders of the bond.

[* 382] by * what title I need not for the present inquire, though I am not disposed to think that fact is always immaterial.

The defendants are mortgagees of the vessel, and, as alleged, mortgagees in possession; when in possession, or how in possession, I do not distinctly understand, nor what effect is intended to be derived from the alleged fact of possession, nor did I observe that such alleged fact was relied on in argument. I apprehend that, as mortgagees, the defendants have a right to impeach the validity of the bond to the same extent and in the same manner as the owners, subject, perhaps, to some distinctions in peculiar cases. But it is of importance, in this and all similar cases, to remember that the title of mortgagee is a title derivative from the owners, and in no respect, as I conceive, superior thereto. The bond itself is in form perfectly regular. It purports to be for the sum of 667*l.* 16*s.* 4*d.*, with 25 per cent premium. The bond states that this advance was necessary for wages and other expenses incurred in the port of Buenos Ayres. The ship alone is hypothecated; the bond is given to Messrs Henry and George Dowse; is dated 12th September, 1844, and signed by the master. The execution is not denied, and I am of opinion, conformably to the principles I have endeavored to make clear, that, in the first instance, it lies upon those who oppose it to make a *prima facie* case of invalidity; that is, to gainsay the act of the master, who is the agent of the parties opposing, or of those from whom they derive their title, subject, however, to the shifting of the *onus probandi* according to the circumstances and rules of evidence.

In order to make my judgment intelligible, I must refer to the pleadings in some detail. The act, as given in on behalf of the bond-holders, embraces various topics; but I intend to confine my observations to those parts only which relate to the bottomry bond. The act states that this vessel, being in the outer roads of Buenos Ayres, in February, 1844, sustained damage in consequence of a gale; that repairs became necessary, and money was required for such repairs, and other expenses; that the master, being without credit, applied to Messrs. H. and G. Dowse to advance the necessary *funds on bottomry; that they agreed so to do, [* 383] stipulating that the freight of the homeward voyage should be a further security for the money advanced on bottomry, and for the liquidation of other demands on the brig or her owners. This, unquestionably, is a peculiar state of facts, and it is necessary to pause and consider the legal effect thereof. It was, under the circumstances set forth in this statement, perfectly competent—and, indeed, in the ordinary course of things—for Messrs. Dowse to advance money on bottomry, and take a bond; I say “under the circumstances;” nor do I know or say that the stipulation *in the charter-party, that the freight should be paid to them as a security for bottomry and other advances, was illegal. But, in the exercise of the ordinary jurisdiction of this court, I could not have enforced the stipulation in aid of the bottomry bond, and still less for payment of other advances. It is true, indeed, that, from accidental circumstances, the freight might come within the jurisdiction of this court, and then I should have power to direct it to be paid to those who had the best title; but this would be an incidental, and not a direct and primary, remedy.

The bond bears date the 12th September, 1844, and on the 14th (as the act states), the vessel left Buenos Ayres, and, after touching at Cork, came to London. Here, so far as concerns the bond, the act ends; for there is nothing more than a prayer for payment out of the ship and freight. It is directly admitted in this act that there were some advances made on bottomry, and some not, and all the court is asked to do is, to pronounce for the bond covering the bottomry advances; and if the statements in the act were correct, and the only statements, the court would have no hesitation in pronouncing for the bond, and directing it to be paid out of the proceeds of the ship, but certainly not out of the freight, and for this reason: the freight is not hypothecated by the bond for those advances, nor indeed is it by the terms of the bond or charter-party made liable for any advances at all; but is simply payable to Messrs. Dowse.

I must now examine the answer to the act, and I repeat the ob-

servation I made in the preceding case — namely, that it [* 384] * ought to contain the whole case on the part of the opponents of the bond. It commences with a statement of the early history of this ship, which it will not be necessary to follow in detail. There were two separate mortgages, bearing date in June and December, 1842. In December, 1842, the ship sailed from Newcastle to Buenos Ayres, consigned to Messrs. Dowse, at that city, in pursuance of an agreement with Mr. James Scarth, of Newcastle, the freighter. The answer then recites the accident which befel the vessel, and the proceedings at Yarmouth, which ended in a mortgage to Mr. Scarth. In April, 1843, the vessel left Yarmouth, and reached Buenos Ayres in July, 1843; and here commences what alone can be truly termed the defensive part of the answer. It states that considerable freight was due from Messrs. Dowse, as the agents of Mr. Scarth; that Messrs. Dowse, instead of procuring a return cargo, direct for England, as Mr. Scarth had stipulated, and as they had agreed to do, did, without instructions, send the vessel, on their own account, for salt, to the Cape de Verds, in October, 1843; that freight to the amount of 359*l.* 2*s.* was earned by that voyage; that in February, 1844, the brig, having just arrived with a cargo of salt, met with an injury in the outer roads of Buenos Ayres. It then expressly states — not an unimportant statement — that repairs were necessary; that Messrs. Dowse caused such repairs to be done, and provided other necessities, without bottomry being contemplated by them, and on the credit of Mr. Scarth; that in April, 1844, they sent the vessel, ballasted with salt, to Paraguay, to load with a cargo of timber, and this also, without instructions; that they have charged 119*l.* 12*s.* 1*d.* as the price of the salt, to the brig, and that freight to the amount of 189*l.*, was earned by this voyage. The charter-party bond is then set forth. Then, as a further ground of objection to the bond, it is expressly alleged that Messrs. Dowse never made mention of a bottomry bond till after the return of the vessel from Paraguay, and that no explanation of the proceedings of the ship could be obtained from Messrs. Dowse, of London; that the large sum of 1,132*l.* 8*s.* 9*d.*, was charged for disbursements, and credit [* 385] given for only * 433*l.* 17*s.*, as the earnings. It avers that, previously to February, 1844, Mr. Scarth had deposited with Messrs. Dowse, of London, a policy of insurance to cover any advances at Buenos Ayres, beyond the freight; that the whole amount of the repairs was 163*l.* 13*s.*, and that 59*l.* 2*s.* 6*d.* was recovered under that policy. It also sets forth the amount of commission, interest, and bottomry premium claimed; it impeaches the conduct of Messrs. Dowse in not sending the vessel home, and denies that a bond was requisite.

It is really indispensable, in so complicated a proceeding as this, where the pleading has run to so great a length, to pause a little at this stage, when all the points to be put in issue ought to be stated, and see what really is in controversy. The first observation which occurs is, that it is in the answer to the act that, for the first time, it appears, there were two voyages from Buenos Ayres before the return voyage. It may be said, and possibly with some truth, as a general proposition, that, in pleading a bottomry bond, it is not necessary, in the first instance, to mention all the particulars, because the bond-holder relies on the execution of the bond, and the opposer of the bond is to show its invalidity; but however brief the original pleading may be, it ought not to give a representation inconsistent with the truth; and yet I cannot read the original act without saying that the only construction I put upon it is, that the repairs were done and the money advanced to fit the vessel for sea, for an immediate homeward voyage, and the transaction is represented as so connected with the charter-party as to render this conclusion almost inevitable. It in effect negatives any intermediate voyage, and is calculated substantially to mislead. The answer, however, for the first time, raises this objection of the voyage to Paraguay, and an important objection it is; it denies bottomry altogether, and the necessity for it, and sets up, as a defence, the credit of Mr. Scarth:

I must now look at the reply, to see how those averments are dealt with. The reply denies any agreement to procure a return cargo, either through Mr. Scarth or * Messrs. Dowse; [* 386] it states that the outward freight was paid at home; that the master had full authority from the owners to employ the brig as he thought fit; and that as no homeward cargo could be obtained, he acceded to the recommendation of Messrs. Dowse to go to the Cape de Verds for salt. With respect to the repairs in 1844, it simply repeats that they were done to enable the vessel to return home, while it contains a distinct averment that the master had instructions from his owners to employ the vessel as he thought best, after her arrival at Buenos Ayres. This must be intended to justify the voyage to Paraguay, especially, for that is the voyage in question, for the voyage to the Cape de Verds has nothing to do with the bond, being long antecedent to it.

I may here observe that there is an abundance of very important averments on both sides; but I am afraid it will turn out that there is a great deficiency of credible testimony on both sides also.

In all these cases, the most important evidence is that of the master. The bond is his own act, and with nearly all the circumstances material to prove the validity or invalidity of the bond, he

must, in most cases, and certainly in this, be acquainted. I have no room to complain of want of evidence on his part, for Duncanson, the master, has made no less than four affidavits. The first, dated 17th February, 1845, states the damage, in February, 1844; the necessity of repairs; that he was without funds, and applied to Messrs. Dowse to advance on bottomry; that the money was advanced by them, and actually expended in necessities for the ship. This statement is corroborated by the protest and surveys, and also by the account rendered, in a great measure. His next affidavit, of the same date, relates solely to what was done at Yarmouth, and the only observation necessary to be made upon it is that it is in corroboration of the statement made by the bondholders. His third affidavit, dated 23d May, 1845, is as to the instructions; as to the freight being paid at home for the outward voyage; as to the intermediate voyages, and as to the advances on bottomry, with [* 387] an account subjoined, which refers to matters * and to advances prior to February, 1844, and the balance of which is included in the present bond; but the act, containing the case of the bondholders, does not profess to call these advances on bottomry; such claim commences with February, 1844, and not at any antecedent period. Five days after this affidavit, on the 28th May, 1845, the master makes another, which is exhibited on behalf of the opponents of the bond. What does he say there as to instructions? Is this statement consistent with his former affidavit or contradictory to it? If contradictory, the whole evidence of this witness is worth nothing, for he must be wilfully perjured. I think the two affidavits are in some degree reconcilable, but not altogether. The reception of further instructions was a fact directly put in issue, and before deposed to by this man, and it is in this last affidavit wilfully kept back. There is no direct contradiction, but there is fraudulent concealment. If there were no other instructions, he has sworn falsely in his affidavit of the 23d May, 1845; and if there were, he has perverted the truth by concealing them in his last affidavit, and giving the court to understand that there were no instructions. I think, after this specimen of Mr. Duncanson's swearing, he is entitled to very little credit where he is not supported by some document or other witness, and to none at all where he directly contradicts his former statements, if he does so. I am sorry to say, I think he does so contradict himself. I wholly disbelieve all his statements as to his treating Messrs. Dowse, and their acting, as the agents of Mr. Scarth; I cannot credit his statement denying bottomry till after the voyage from Paraguay, in direct opposition to his previous oath. That the master did not, after the outward voyage, act under the

instructions of Mr. Scarth, is clearly proved by the affidavit of Mr. Scarth himself, whose veracity I have neither reason nor right to distrust. That Messrs. Dowse did not and could not act as his agents is equally disproved, and to this I may add that there is an affidavit from the owners of the vessel in confirmation of the representation of the mortgagees.

The real difficulty in this case is the deficiency of evidence *on the part of the bondholders—deficient partly [* 388] through the misconduct of the master, and partly from their own imprudence in not obtaining direct evidence from Buenos Ayres. Mr. George Dowse's evidence is open to this objection, that he cannot know, of his own knowledge, what took place at Buenos Ayres, and the facts occurring there are most important. But still his affidavit is, in many respects, not without weight, for, as to many preliminary facts, it proves the general correctness of the statements of the bondholders, and so far raises a presumption in favor of what is not established by direct evidence.

One important part of Mr. Dowse's affidavit is a letter annexed thereto, written by him to the house at Buenos Ayres, telling them not to advance money except on bottomry, and Mr. George Dowse swears that "such letter, as he verily believes, was duly received by his brother before the arrival of the vessel at Buenos Ayres." Now there is no direct evidence of this letter having been received at all. The fact stands on Mr. Dowse's belief only, and the very caution with which he has sworn has occasioned the greater part of the difficulty, for, looking at the letter itself, it is scarcely possible to doubt but that, if received, the receipt must have been acknowledged, and if acknowledged, he would have been justified in swearing positively to the fact. And this difficulty is enhanced by the total absence of all correspondence from the house at Buenos Ayres, and some correspondence it was almost natural to expect. However, it is my duty not to flinch from the question; I must decide whether this copy of a letter be admissible or not, though I must regret that such a point should occur.

I am of opinion that, in this mode of proceeding, by act on petition, the affidavit of Mr. G. Dowse will justify me in admitting this letter, and why? Had he sworn positively to its receipt, I must have done so, and the qualification, "as he verily believes," must not, at least in such a proceeding as this, be scanned too narrowly, and held to mean only that he believes it was received because it was sent: if that was all, I could not admit it, for the mere fact of sending the letter would not prove that it had been received.

But * Mr. Dowse may have other reasons for swearing to his [* 389]

belief, and I think I am bound, therefore, to admit this copy as the copy of a letter actually received at Buenos Ayres. Now this letter is of great importance, for it states that the owners were bankrupts, and it expressly cautions the house at Buenos Ayres not to make advances to this vessel without a bottomry bond. To suppose, in the face of such a letter, that the house at Buenos Ayres would have advanced money without bottomry, were to suppose them destitute of ordinary care and caution. But I wish it to be distinctly understood, that my judgment will not be founded upon this letter; it would have been the same, whether the letter had been received or rejected; but if properly admitted, it will be confirmatory of what I should have done, had there been no such evidence.

Then what is the evidence in support of the averments of the opponents of this bond? If the master is not worthy of belief, there is no evidence at all, except the affidavit of Mr. Halket. Is there any fact in his affidavit of importance? There is one which incidentally, though not directly, might have had some weight, namely, that the ship was detained by Messrs. Dowse at Buenos Ayres, contrary to the wishes of the mortgagees. But this averment is not in the act on petition, nor is there a shadow of proof to support it. How did the mortgagees express their wishes? By letter? If so, to whom? There is not one iota of evidence to show that the mortgagees ever interfered at all, directly or indirectly, till the vessel came to this country. If they had done any thing, there must have been a correspondence with the owners, or Messrs. Dowse, or Mr. Scarth, or the master, and none is produced, or even averred. Indeed, it is evident from his affidavit, that Mr. Halket is drawing conclusions from what passed with Mr. Dowse, of London, rather than stating specific facts.

From the accounts I cannot attempt to draw any safe conclusions.

The result, then, in my judgment, is this: that the case of the mortgagees, so far as it may depend upon facts not admitted in the cause, is wholly unsupported by any credible evidence.

[* 390] As to the case of the bondholders, I am of opinion that the bond must be pronounced for, because there is nothing to gainsay its validity; and because, such as the evidence is, from the tergiversation of the master, all the circumstances which are proved render the advance on bottomry, and not on personal credit, probable. It is not pretended that the master had any letters of credit on any person at Buenos Ayres. The owners had no correspondent, and had become bankrupts; the mortgagees did not interfere; and, independent of the letter, there was no one circumstance to have induced Messrs. Dowse, at Buenos Ayres, or any one else, to

advance money on personal credit. As to the vessel's not returning home, there is credible evidence that no homeward freight could be obtained, and there is no evidence to satisfy me that Messrs. Dowse improperly detained her. With respect to the intermediate voyages, I do not perceive how the first to Cape de Verd operates on the present question; but if there be no direct evidence that the master had new instructions to deal with the ship as he thought best for those interested, there is none to prove that he had contrary instructions; and if he had no instructions, I am of opinion that, in the exigency of the case, and the absence of homeward freight, the master, being left to his own discretion, did not abuse it by engaging in the undertakings in which he embarked. I do not consider them as wholly new voyages, out of the contemplation of all parties, but as grafts upon the original enterprise, not improbable, *à priori*, and justified by the circumstances.

There remains, however, one fact which I do not remember to have occurred in any former case.* The repairs and expenses, out of which the bond is said to have arisen, became necessary in consequence of an accident antecedent to the voyage to Paraguay, but the bond is not dated nor executed till after the completion of that voyage. Now how stood Messrs. Dowse during this intervening period? Bottomry bond they had none, and if the ship had been lost during this intervening voyage, could they have claimed payment against the owners, if solvent, and if they could, is not that inconsistent with a bottomry transaction, which relieves the * owners from personal responsibility? This is a difficulty, [* 391] and I do not like to evade it. My opinion, after the best consideration I can give to the point, is, that this circumstance does not form a fatal objection, and for this reason: *non constat* that Messrs. Dowse would or could have established any claim against the owners personally, if the ship had been lost on the intervening voyage, and unless the right to enforce such a claim was clear, which it certainly is not, they cannot be prejudiced in enforcing a bottomry claim, otherwise just, because they ran an extraordinary risk — one, indeed, against which they might, if so disposed, have protected themselves by ordinary insurance, and, I should think, at no extravagant rate.

I must, for all these reasons, pronounce for this bond; but for the bond and for the advances stated in the original act, and not for other payments, which did not originate from the misfortunes which befel the ship in February, 1844. I cannot go beyond the demand originally made; I am bound by the original act. This will render a reference to the registrar and merchants necessary, unless the mat-

ter be agreed. The bond is to be paid out of the ship alone; whether the ship can be relieved from other charges, in part or in whole, I have no materials to determine.

SUPPLEMENT.

IN IRELAND.

[* 31]

* THE LONDONDERRY.

Appeal—Cause.

December 8, 1845.

Collision. Where a large steamer, proceeding, during a dark night, in the Frith of Clyde, a very thronged thoroughfare of traffic, at the rate of from twelve to fourteen miles an hour, came in collision with a small schooner, deeply laden, which (the tide being ebb, and the wind very light) was incapable of altering her position by helm or sails, and, not being seen by the steamer, (the schooner not having or exhibiting any light,) was run down and sunk :

Held, that the steamer was responsible for the damage done, her watch and look-out, though sufficient under ordinary circumstances, not being proper under the circumstances of the darkness of the night and the steamer's rate of going. What, in such a case, is a sufficient and proper look-out. Rule of navigation as to lights on board sailing-vessels.

THE appeal in this cause was brought against a definitive sentence of the judge of the Court of Admiralty in Ireland, (Dr. Stock,) pronounced by him in a maritime cause of collision, in which the respondents were the promovents, and the appellants the impugnants, whereby he awarded the respondents the sum of 500*l.* for the loss of their schooner.

The respondents, in their original libel, (23d January, 1845,) in substance stated — that The Dolbadarn Castle was a schooner of 48 tons, and had on board a crew of three men and a boy ; that on the 7th September, 1844, she sailed from Carnarvon with a cargo of slates, bound for Glasgow, and on the morning of the 10th, between one and two o'clock, she was in the Frith of Clyde, between the Camray and Toward Lights, under sail, with all her sails (which were white) set, but owing to the tide being ebb and the wind very light, she had little or no way on her, but lay almost becalmed ; that the sky, at the time of the collision, was clear, with good star-light ; that about one o'clock, two steam-vessels passed the schooner, which both saw and hailed her, and that subsequently, and before the col-

lision, a third steamer approached her, which also hailed her; that after the last-mentioned steamer had left the schooner, her master (Pritchard) being on the bow on the look-out, and Ellis, a seaman, at the helm, (the mate and boy being below,) Pritchard observed another steam-vessel, at about two miles' distance, approaching the schooner at "full speed," with the ebb tide, and as she approached, perceiving she did not alter her course, hailed her, when the mate and boy, who were below, came on deck, and with Ellis, who fastened the tiller, ran forward and joined the master, at the pitch of their voices, in hailing the steamer, *but to their [* 32] frequent hailing no reply was made, nor did any person appear forward in the steamer; that the master of the schooner then loudly hailed them to port their helm, standing at the time at the larboard bow; eventually, the steamer came with full force on, and struck the schooner on the said bow, between the cathead and the fore part of the bow, and her paddle-box grazing the side of the schooner, she shot ahead, whereupon, Pritchard finding the schooner beginning to fill, he and his crew launched the boat over the schooner's side, which was then so quickly settling down, that of her crew, the master and boy only had time to leap into the boat, which had half filled with water in the launching, leaving the mate and Ellis, the seaman, behind them. Ellis then leaped from the vessel and was dragged into her boat; and afterwards, just as the schooner sank, the mate also leaped from her, and was picked up by the boat in an almost senseless state. The libel then states that the master and crew went on board the steamer, where Capt. Wyse, the commander, having got his steward to draw up a written document, purporting to state the facts attending the collision, obtained from them their marks to it, and having lent them a pair of oars to take their boat to land, proceeded on his voyage, and that, subsequently, the crew of the schooner were picked up by the Champion steamer, and taken to Greenock. The libel then alleges that the collision took place through wilful neglect, or want of skill, on the part of the captain, officers, and crew of the steamer, and for want of a proper look-out; and would not have happened had they exercised only ordinary care, caution, and maritime skill.

On the part of the impugnants, a matter contrary and defensive was filed, in answer to the libel, and which stated that The Londonderry was a large, strong-built steamer, of 277 tons burden, and had on board a crew of sixteen persons; that at half-past eight, P. M., on the 9th September, she left Glasgow, on her voyage to Londonderry, and that at a quarter to one o'clock, on the morning of the 10th, being off the Block Light, the watch was set, and the second

mate took his station on the quarter deck, in charge of the vessel,

Graham, seaman, at the helm, and a seaman and an ap-

[* 33] prentice * at the paddle-box gangway, as a look-out; that

the steamer ran her course in mid-channel, about one mile and a half from the land on either side, in perfect obedience to her helm; and that at or about the hour of one, being then nearly abreast the Toward Light, the man and boy on the paddle-box gangway suddenly saw a small vessel right ahead, distant about two lengths off the steamer, and coming right stem on, when the man instantly gave the alarm, and as there was not time to stop or reverse the paddles, with any hope of taking the way off the steamer, which was then going through the water at a rapid rate, in time thereby to prevent a collision, shouted out to the helmsman, "Hard a-port, hard a-port! good God, hard a-port!" and although this was immediately obeyed, the vessels came in contact, and the small vessel went down; that the schooner had not any light up, and that, if she had, she would have been seen; and the document before alluded to was put in issue, namely:—

Londonderry steamer, September 10th, half-past one o'clock, morning, 1844, abreast of Inverkip, or thereby. The Londonderry steamer, on her passage from Glasgow to Londonderry, morning very dark, came in collision with the schooner Dolbadarn Castle, on account of having no light—stopped the steamer, and lowered away the boats, when the said schooner went down—crew saved, which is testified by the master and mate.

It was further alleged, that the morning was decidedly dark, with a thick haze on the water, and that "the loss of the schooner was solely occasioned by the carelessness, neglect, and want of proper skill of her crew, in not being provided with the proper necessities and requisites for the navigation of their vessel; for that no collision would have taken place if the schooner had had a light hoisted, or had shown a light taken from the binnacle or cabin of the said vessel, even two minutes before the accident, or had they got out oars, and pulled a few vigorous strokes, they might have got their vessel out of the way." The defensive matter then alleges a receipt obtained by Capt. Wyse from the master of the schooner on the 13th September, when the steamer had returned to Glasgow, and which receipt is an acknowledgment for the sum of 5*l.* as a charity

[* 34] * to the said master and his crew in their destitute situation,

and as a gratuity, and not as having any claim for the loss of the schooner against the owners of The Londonderry.

The promovents, by leave of the court, exhibited additional articles to their libel, and which stated, "that it was the duty of captains

of steam-vessels, when at night, or in thick or hazy weather, coming into or going out of harbors, and in roadsteads and channels, where coasting, trading, and fishing-vessels are frequently met with, to place a man on the look-out at the bow of the steam-vessel, in order to pass the word to the man on the gangway, and that a man at the bow could, from his position, perceive an object at a greater distance and sooner than a man at the gangway, and, from his distance from the machinery, would be better able to hear any noise or shouting from a boat or vessel in the direction the steamer would be approaching; and that in such localities, in hazy weather or dark nights, it was the duty of captains of steamers to proceed slowly, and with caution, and from time to time to ring the bells on board their vessels; and occasionally to fire guns, and to stop their vessels, in order to ascertain if there should be any signal in reply, or any noise or shouting from other vessels in their course."

Additional articles were filed on behalf of the impugnants, in which it is alleged, "that it is the duty of sailing-vessels, in rivers, channels, and roadsteads, where other vessels and steamers are frequently met with, such as the Clyde, to carry and show a light at night, and more especially if they should see a steamer bearing down upon them."

At the hearing of the cause in the court below, *Sir Thomas Staples*, Bart., Q. A., *Gibbon* and *Hayes*, D. D., appeared for the promovents; *Gayer*, *Radcliffe*, and *Peebles*, D. D., for the impugnants.

The cases cited were *The Iron Duke*,¹ *The Rose*,² and *The Virgil*.³

* The evidence of Richard Pritchard, master of the schooner and part-owner, was objected to on the part of the impugnants.

After hearing the advocates on both sides,

DR. STOCK, the judge of the court, decided that, notwithstanding his being a part-owner and a party to the record, he would hear his evidence read *de bene esse*, and, as far as his evidence was such that the promovents could not have produced other evidence of the facts detailed by him, on the ground of necessity, he would admit his evidence.

¹ 2 W. Rob. 377. It is remarkable that the collision in this case was not only under similar circumstances, but occurred on the same night as that now reported.

² 2 W. Rob. 1.

³ *Ibid*, 201.

JUDGMENT. — June 20th.

DR. STOCK. This is a cause of collision brought by the owners of the schooner Dolbadarn Castle, of Carnarvon, against the steam-packet Londonderry, employed between the city of Londonderry and Port Glasgow. The collision took place at, or very nearly about, a quarter of an hour after one o'clock, on the morning of the 10th September, 1844. The place where the casualty happened was in the Frith of Clyde, abreast the Toward Lighthouse, in Argyleshire. The effect of this collision was the total loss of the schooner, which in consequence of the stroke she received, foundered in the space of not more than five minutes. The crew were happily saved by their own exertions, after being exposed to great peril of their lives.

The Dolbadarn Castle was laden with a cargo of slates from Carnarvon, and bound for Port Glasgow; she was by register forty-five tons burden, but her cargo was of the weight of upwards of seventy tons, and the vessel of course must have been deeply sunk in the water, with little of her hull above. At midnight of the 10th of September, and thenceforward to the time of the accident, there was, as I collect, a light wind from the N. N. W. The evidence as to this is somewhat variant; the people on board the steamer conceived the wind to be S. S. E., but as it is certain, from whatever point it blew, it was very light, it is probable that they on board the steamer have spoken of the current of air produced over their bows by the velocity of the course of the steamer, and have mistaken or misdescribed this current as if it was wind which was blowing. I rather in-

[* 36] cline to *take the truth of the case, in this respect, from Williams, the master of The Three Brothers, which vessel was not far off astern of the schooner, and he states the true point of the wind to be N. N. W. The tide was on the ebb; the schooner, heavily laden, was laboring up against the adverse tide, with all her sails set, and must have derived some aid from the wind, as otherwise she would have gone adrift with the ebb; she was, however, as I collect, but barely able to make head against the current, and was in fact, nearly in a state of rest.

The schooner being thus situate, at a quarter of an hour before one o'clock, the Londonderry steamer, a powerful vessel, bound for the city of Londonderry, was abreast of Clough Point, (where the lighthouse is,) on her passage down the river, and then and there, she set her watch. She had a well-appointed crew of sixteen hands, including the engine-men, and had also several cabin passengers on board. From Clough Point to the place where the Toward Lighthouse stands, the distance by sea, by the shortest course, is about twelve or thirteen miles. From her position where she set her watch.

abreast of the Clough Light, to her position when she came in contact with The Dolbadarn Castle, half an hour or thirty-five minutes after, the distance cannot be less than ten miles; this distance the steamer made in somewhat more than half an hour. I think, therefore, it is fully proved that she was going at a very high rate of velocity when the misfortune occurred.

The night was undoubtedly dark; there was no moon, and the lower part of the atmosphere was cloudy in that neighborhood, with a considerable degree of fog, leaving the upper parts of the surrounding highlands clearly visible, though upon the water and low land there was much obscurity. On this part of the case there is the greatest apparent contradiction and discrepancy between the accounts given by the opposite sets of witnesses, nor is it easy to form a conception of the real appearance of things out of the representations offered by these different deponents. Admitting the night to be dark, and an atmosphere carrying fog, still it is allowed that the upper part of the heavens was unclouded *and [* 37] serene, with starlight. It is the nature, very often, of fog to be intermittent, and to vary, from minute to minute, in the degrees of density; thus it becomes possible to reconcile, in some degree, the clashing testimony of the witnesses. Williamson, the coast-guard man, from his station at Inverkip, was able, at one o'clock, to see a steamer, two miles off, so plainly as to be enabled to give a description of her dimensions, and not merely to recognize her by her lights, but to depose to her size, as being a very large steamer. The master of The Three Brothers, at the same juncture of time, perceived a steamer at two miles distance, and distinguished her three masts. There may be also grounds for supposing that, from the particular circumstances of the night, the distinctness of the visual perceptions may have been more or less affected by the direction in which the view was carried, and that it may not have been so easy for those coming down the river from the north to observe the objects coming from the south, as for those going up the river to see the ships that might be descending with their heads in a southerly direction. I do not lay much stress on this, except as a circumstance tending possibly to account for the variant testimony in this case. However this may be, so far as the state of the night affects the conduct of the impugnants' vessel, it must be taken to be a dark night. It is so pleaded in the allegation of the impugnants, and the impugnants have put in proof and exhibited at the hearing a memorandum of certain of the circumstances attendant on the collision, which was drawn up at the time, and which was attested by several of their own people, as well as by the two Pritchards; and in this memorandum it is recorded expressly that the night was very dark.

Now then, how stands the case on the facts alleged and proved? That The Londonderry, in the middle of a dark night, proceeded down the river or Frith of Clyde, with an ebb tide, from Greenock to Camray Isle, at a rate of full twelve, and perhaps it would be more near the truth to say, at a rate of thirteen or fourteen miles an hour. The Frith of Clyde, above Camray Isle, is, we all know, a very thronged thoroughfare of traffic. There is a great general [* 38] and colonial *trade, and a great coasting trade for craft of all dimensions and of all descriptions. That a rate of velocity so high as twelve or thirteen or fourteen miles an hour, in such a situation and under such circumstances, in the darkness of the night, is faulty and improper for a steamer to assume, is a proposition too well established by authority to make it necessary for me to dwell upon. Now I think it is quite clear that, on general grounds of argument, and upon the general bearing of the facts, The Londonderry cannot justify her rate of speed on that occasion, and that, generally speaking, the speed was inconsistent with the security of the shipping in the river, although, as respects The Dolbadarn Castle, the damage occasioned may possibly be excused on the special circumstances of the case.

Then what is the case alleged by the promovents? That their vessel, being deeply laden and very heavy in the water, and reduced, by the state of the wind and tide almost to a motionless state, was endeavoring to work up her way as well as she could, in the mid channel, with all her sails set, and that to any ship having a good look-out, her rigging would be visible at a sufficient distance to enable such ship, possessing the free command of her own motions, to avoid her; that, nevertheless, The Londonderry missed seeing her until the moment of collision, and came bearing down directly on her bows with so much force as, upon collision, to occasion her sinking in the space of a very few minutes.

It appears to me that the facts constituting the case of the promovents, so far, are sufficiently well proved. There is no doubt, I think, that, in fact, the watch of The Londonderry did not perceive the schooner until they were somewhere about a length or a length and a half off the steamer, bearing down upon the bows of the schooner. It is, I think, also sufficiently evident that it did not lie in the power of the schooner, by any endeavor or effort of nautical skill, either by the helm, or her sails, or by oars, to save herself, through her own unassisted exertions. This, therefore, is not a case belonging to that class in which blame can be imputed to the suffering party, by reason of mistaken or erroneous manœuvring, [* 39] or neglecting the proper application of the *resources

within their power, through the employment of their helm or sails. The schooner was, in fact, quite helpless; the steamer possessed of the highest degree of power and agility. To have attempted, in the situation of the schooner, to change her position in the water, for the purpose of getting clear of the steamer, would, in my opinion, have been only aggravating the danger, and embarrassing the means which the steamer had to effect her preservation.

Now it is said, and insisted upon, that the burden of proof lies on the vessel which is proceeding to recover damages for the injury sustained. No doubt it does. It lies upon the owners of The Dolbadarn Castle to make out, in the first instance, a sufficient *prima facie* case in support of their libel. This case I take to consist, first, of the proof that The Londonderry, coming down the river at night, and being the more powerful vessel, or rather the only vessel of the two which had any power to prevent the collision by manœuvre, ran foul of The Dolbadarn Castle and sunk her; secondly, of proof that, at the time of the fact, she, The Londonderry, was going at a rate of speed which, under the circumstances, was unwarrantable and dangerous to the shipping in the road; and thirdly, of the testimony of witnesses produced to prove that the night was not so entirely dark, or the weather so hazy, but that, with a good and sufficient look-out, The Londonderry might have obtained a view of The Dolbadarn Castle, and her rigging, in time, with proper exertion, to avoid her. The two first points of the promovents' *prima facie* case are, in my judgment, established by clear evidence. The third position, namely, the probability, from the state of the weather, that there must have been a defect of vigilance on the part of The Londonderry, and that, in fact, her watch was not sufficient, under the circumstances, rests upon a more doubtful body of evidence, which is contradicted by a great number of witnesses to the contrary, produced by the impugnants; but I am now considering the evidence only so far as it is to be regarded as constituting a *prima facie* case. Now, independent of the depositions of the promovents' witnesses, the two Pritchards and Ellis, as to the state of the weather, and as to the fact
* of their having been passed by several other steamers before, who perceived and hailed them, there is the testimony of Williams, the master of The Three Brothers, and of Williamson, the coast-guard man, both disinterested. These two witnesses agree in swearing that each of them, at the distance of two miles, or thereabouts, at this very time, saw a large steamer, whose size they were well able, by the light at this hour remaining, to estimate and ascertain; and one of them adds, that he was able to distinguish the three masts of the steamer he perceived. It is impossible for me to say

that such evidence, if not encountered and overthrown — if, in fact, taken upon an *ex parte* case — would not be sufficient, *prima facie*, to bear out the allegation of the promovents; I am, therefore, I think, warranted in saying, that the promovents' libel is proved, *prima facie*, on the three distinct and material averments, namely — the running down, the improper velocity of the steamer's course, and the probable want of vigilance on the part of the watch.

This being so, it follows, in my judgment, that the burden of proof is shifted, and that The Londonderry is put clearly on a case of exculpation.

The matter of the defence, or exculpation, offered by The Londonderry, consists essentially in two points: First, she alleges that her watch was perfect and unexceptionable, consisting of a due complement of seamen on deck, rightly placed, under right command, and performing their duty to the best of their ability; but that the night was so dark, that by no possibility could they, in this state of the weather and the time, have discovered objects of the bulk and appearance of The Dolbadarn Castle until close upon them. Secondly, it is pleaded that, in this state of things, the blame of the collision is to be imputed to The Dolbadarn Castle; for it is pleaded that The Dolbadarn Castle had no lights, either as a general precaution before the accident, or after she was actually herself warned of her danger by seeing The Londonderry bearing down upon her bows.

Upon the first point, namely, the sufficiency of the watch, it appears that the second-mate paced the quarter-deck, and was [* 41] in command, and besides the helmsman, five seamen * were on the gangway between the paddle-boxes. This might be, probably, under ordinary circumstances, a perfect and complete watch, liable to no exception; but after an anxious consideration of this part of the case, upon the best lights I can obtain, and weighing the very able arguments which have been addressed to the court on both sides, I cannot avoid coming to the conclusion, that the circumstances were not ordinary, but so far extraordinary, in this case, and the responsibility assumed by The Londonderry, from her mode of navigating this channel at midnight, was such, that she does not satisfy the obligation of duty she placed herself under, by merely proving that she set such a watch as would have been sufficient under ordinary circumstances; I think she was called on to have set a watch deficient in no one particular which, by any reasonable probability, could have contributed to the completeness of her look-out. On this principle, I apprehend that the proof which the case affords, that there was no look-out placed forward, nor at the bows of the steamer, is fatal, on this head, to the defence set up by The Londonderry.

The second ground of defence on the part of The Londonderry is the neglect of The Dolbadarn Castle in not hoisting a light in due time, or at all, which would have been an effectual precaution, as the steamer alleges, to prevent the accident. This neglect, say the impugnants, was the real and sole, or chief, cause of the calamity, which, therefore, was the fruit of the imprudence and supineness of the promovents themselves, and is in nowise to be visited on the impugnants. Now, in making this charge of neglect against the promovents, the impugnants labor under this great difficulty—they either allege that the night was dark, or that it was not. If it was not dark, then no special necessity devolved on the promovents to hoist a light; if, on the contrary, it was dark, then the conduct of the impugnants' vessel herself was wholly unjustifiable, from the speed which was upon her, and the want of a look-out forward at the bows.

But with respect to this question of the obligation imposed on The Dolbadarn Castle to hoist a light, the court does not, * on the whole, feel perplexed with any great doubt or difficulty. [* 42] According to the general principle, as settled in the case of *The Rose*, and of *The Iron Duke*, there is no obligation on a sailing-vessel to hoist lights, except when she wants a pilot. It is very true that, in not hoisting a light, there may be shown, under the circumstances of particular cases, such evidence of gross folly, or wilful neglect, as to disentitle a complainant to any relief. In the present case, I do not think there is ground for a charge against The Dolbadarn Castle of gross folly or wilful and perverse neglect; she had passed no less than three steamers in perfect safety, prior to the appearance of The Londonderry, and it would appear, I think, that The Three Brothers, just astern of her, had not a light hoisted any more than herself. I do not think, therefore, that the neglect of The Dolbadarn Castle (though far from being a subject of praise or approbation) was of that kind (the general rule of navigation being with her) as to disentitle her to sue here for damages; that is to say, I do not think the circumstance can be brought forward to nonsuit the promovents, or put them out of court, on the ground of demerit.

Then, can this ground of defence be set up as a reason for dividing the damages, and throwing the burden of one moiety on The Dolbadarn Castle, as being equally in fault with The Londonderry? It appears to me that I cannot apply the doctrine in this case. The damage sustained was all to one of the parties only, and I do not understand how there can be raised a question of a compensation of losses.

This being so, the only way in which the impugnants can avail

themselves of the want of lights on the deck or rigging of The Dolbadarn Castle is, by using the circumstance to sustain what is technically termed the plea of inevitable accident—namely, that the collision was caused, not by the fault of the impugnants, but by an accident which could not be avoided; that The Dolbadarn Castle was not visible in consequence of having no light, and therefore it was the misfortune, but not the fault, of The Londonderry to have run her down.

But this defence of inevitable accident is clearly not sustainable *in the present case. For this position I rely on the case of *The Virgil*, 2d Notes of Cases, 500. It is settled that an impugnant, setting up the plea of inevitable accident, must be able to clear his own conduct of all blame for imprudence and want of caution.

I have thrown entirely out of sight, in viewing the evidence, the memorandum drawn up by Risk, the steward, as I conceive it to be partial, incomplete, and not devoid of a serious objection on a ground of duress and surprise. I also view with great jealousy the receipt exacted from the Pritchards at Glasgow on the 13th September.

I feel considerable confidence as to the grounds of my judgment, and I decree for the promovents, with costs.

The evidence of value is not satisfactory, and the promovents must make proof at their own expense.

The promovents offered evidence, *viva voce*, as to the value of the vessel, when the judge pronounced for damages 500*l.*, with costs.

From this judgment an appeal was lodged by the impugnants before the Court of Delegates.¹

The first question that arose was as to the right to begin; and after some observations on both sides, the court decided that the appellants, although they were the impugnants below, had a right to begin, this being the usual course adopted in appeal cases to the House of Lords.

The next question was as to the admissibility of the evidence of Richard Pritchard, who was a part-owner of the vessel that belonged to the promovents, and also a party to the record, and whose evidence had been objected to below. After hearing the advocates on

¹ The judges delegate consisted of the Hon. Charles Burton, Second Judge of the Court of Queen's Bench, Ireland; the Right Hon. Louis Perrin, Fourth Judge of the same court; the Right Hon. John Richards, Fourth Baron of the Court of Exchequer, Ireland; John Finlay, Esq., LL. D., and Charles H. Todd, Esq., LL. D.

both sides, the court decided that, as far as the facts detailed by him could not have been proved by any other person, they would, on the ground of necessity, admit it.

Gayer, D., stated the case for the appellants, after which [* 44] their evidence was read. *Sir Thos. Staples*, Q. A., stated the respondents' case, when their evidence was read and spoken to by their junior advocate, *Hayes*, D. *Peebles*, D., then addressed the court for the appellants, and was followed by *Gibbon*, D., for the respondents, when *Radcliffe*, D., for the appellants, summed up.

The court reserved its judgment till the 8th December.

JUDGMENT.

MR. JUSTICE BURTON. This case has been argued on both sides with great care and ability — so much so, that I cannot conceive that any thing could be added on either side, either by argument or proof; and I have to express my thanks to the learned advocates, who have left me nothing to regret but the necessity of making a decision attended with so much expense to the appellants, for I feel bound by the facts and evidence to affirm the decision of the court below; and in this decision I have the authority of my learned brethren to declare their concurrence. I feel bound to acknowledge that the opinion I have stated, as being in accordance with theirs, has been mainly formed upon their own views, both of the facts and the law of the case.

It is clear that the collision was the act of the steamer; and the question is, whether the accident was, reasonably speaking, inevitable, or whether, in any degree, it was occasioned by the want of due precaution and care on the part of the appellants. On this, the facts of the case are such as to satisfy my mind, that a proper degree of care and vigilance was not taken by those on board the steamer, and that such want of precaution must be taken as leading to the collision. It has, indeed, been fairly admitted, that on such a night as that on which the collision took place, proper precaution was necessary, and more especially necessary on the part of the steamer. It was, as I conceive, incumbent on those who directed the course of that vessel to have what is called a proper and sufficient "look-out." As to the meaning of this term and the duty of having such a "look-out," there is no dispute, and the only question is, whether, in point of fact, there was, on the part of the steamer, a [* 45] sufficient "look-out." On this I have only to say, that the evidence and the reasoning upon it have satisfied my mind that the

"look-out" was not sufficient, under the circumstances. I am satisfied that there ought to have been, in addition to the two men on the paddle-box gangway, one or more on the bows; and further, that, although a good "look-out" was most important, yet it was not the only precaution that ought to have been taken: there ought also to have been on deck a proper person, (I mean a person in authority and station,) fit and proper, in case of emergency, to cause an immediate stoppage of the machinery, and thereby slacken the rapidity of the vessel's motion, if necessary. Of the necessity of these precautions I am satisfied by the evidence of persons who, from their profession and employment, are quite competent to express an opinion, one of them being himself the captain of a steamer.

It is contended, however, that although this may be so in ordinary cases, yet that, in this particular case, such precaution would have been wholly ineffectual, on account of the obscurity of the night. It seems to me that there may be some doubt as to the strict accuracy of the testimony as to the state of the night; but supposing it to be strictly accurate, it seems to me only to lead to another instance of want of precaution; I allude to the rapidity of the steamer's motion in that state of the night, with a haze on the water. No one admires steam-navigation more than I do, or rejoices more in the advantages accruing thereby, not only to the owners of steam-vessels, but to the public, who first gain advantage by the great celerity of motion obtained by them, and secondly by the almost instant power and facility of slackening the speed when requisite; but this power, I mean the power of instantly slackening the speed, is to be used not merely for the advantage of the steamer itself, but also for the benefit of the public in cases where the excess of speed might occasion danger and injury to others. On the whole, I think that this want of precaution is sufficiently proved; and consequently, that the defence of inevitable accident has not been established.

[* 46] * It remains only to consider the claim made against the schooner for equal contribution; and on this part of the case I must say there at one time existed a strong impression on my mind that the crew of the schooner were culpable, in not being in a condition to hoist a light; but, on hearing the authorities on this subject, and the views of my learned brethren, I am now satisfied that we cannot, consistently with the authorities, hold that opinion. It appears that the schooner had not the means of hoisting a light at the time of the collision; so the question would be, whether she was bound to have on board the means of showing a light, or not? It appears clearly that, by the rules of navigation, it is not incumbent on a sailing-vessel to have such a light, supposing it not to be at

anchor, with its sails furled, and this because the exhibition of such a light is considered to be a signal for a pilot; and however much I might regret the existence of such a rule no otherwise qualified, or entertain a hope that some navigation rule may be established for the future, by which it may be made necessary and incumbent on sailing-vessels to have the means of hoisting a light in case of emergency, I do not consider myself competent to judge of the propriety of such a rule, or its practicability, consistently with the other rules of navigation; and I must presume that due deliberation was had before the rule was left in the condition it is — that is, that it is not incumbent on sailing-vessels to hoist lights, merely for the purpose of having their particular positions noticed by other vessels: by this rule I consider I am bound, and on the whole, I am of opinion that the judgment must be affirmed, and with costs.

The other judges delegates fully concurred.¹

Proctors:— *Watt*, (Queen's proctor,) for the respondents and promovents below; *Anderson*, for the appellants and impugnants below.

¹ Dr. Monk Gibbon has favored the editor with these valuable decisions, with the permission of the learned judges.

7
CASES

SELECTED FROM VOLUME V.

OF

NOTES OF CASES.

[THE CASES SELECTED ARE THOSE NOT REPORTED IN THE REGULAR REPORTS.]

1846-1847.

NOTES OF CASES.

VOLUME V.

*THE ROBERT BRUCE.

[* 156]

Appeal — Cause.

February 15, 1847.

Salvage. Services rendered by a steamer to a vessel valued, with cargo and freight, at 11,000*l.*; the salvage reward of 250*l.*, allotted by the Court of Admiralty, increased, on appeal, to 500*l.*

THIS was an appeal from the High Court of Admiralty, in a *cause of salvage, by the Caledonian Steam [* 157] Towing Company, the owners, the master and crew of the steam-vessel Robert Bruce, against Robert, William Mackintosh, and Robert Hutton, and Matthew and John Forster, the owners of the schooner Medora, of 110 tons burden, bound from Africa to London, with a valuable cargo of gold dust and palm oil, for services rendered to that vessel. The act on petition on behalf of the salvors, alleged that, on the 17th September, 1845, The Robert Bruce, of 120 horse-power, and value 6,000*l.*, was proceeding towards the river Thames, having a vessel in tow, when, about half-past one P. M., in consequence of a heavy gale from W. S. W., the vessels were brought to anchor near the Middle Oaze Buoy, till the weather moderated; that about two, The Medora, which had been riding by both her anchors, about mid-channel between the West and Middle Oaze Buoys, was observed driving rapidly towards the Mouse Sand, with her ensign union downwards, hoisted in her main rigging, and firing signals of distress;

that Barrowby, the master of the steamer, immediately proceeded to get her under weigh, for the purpose of saving the schooner, and whilst so doing, The Orwell steamer approached the schooner, but left her, being unable, in consequence of the heavy sea, to get sufficiently near to take hold of her; that about three o'clock, The Robert Bruce, with great exertions, got within hail, when the master of The Medora entreated that the steamer would take hold of the schooner, which was then within half a mile of the breakers, of the Mouse Sand; that Barrowby, having disconnected the engines, whereby he was able to bring them to bear on either side, brought the steamer near enough to the schooner to throw a line on board of her, by which the steamer's best hawser was hauled on board the schooner, and made fast to her foremast, the steamer being in great danger, during this time, of being dashed against The Medora by the heavy rolling of the sea; that the schooner's cables being cut, the steamer commenced towing ahead, but the gale was so violent that she was for some time unable to make much way, though she kept the schooner from driving further towards the sand; that [*158] she continued towing her in the *direction of Sheerness, (the schooner being frequently drawn under water, as far as her foremast, by the great power of the steamer,) where they arrived safely about 9 P. M.; that one of the schooner's cables had parted whilst she was at anchor during the gale, and her remaining anchor had proved insufficient to hold her, and she had no other anchor or cable; that the master of the schooner expressed himself thankful to Barrowby for his services, declaring that without them the schooner must have been lost, and gave him the following certificate:—

Medora,
Off the Mouse Sand, 17th September, 1849.)

This will certify that Captain Bereby [Barrowby] of the steamer Robert Bruce, has rendered to us every assistance in his power, readily and cheerfully, supplying us with warps and chains, besides the services of his steamboat to tow us into Sheerness; and that, during the whole time he was with us, he exerted himself in every way with skill and ability, to our entire satisfaction.

J. W. Thompson, Master, schooner Medora.

To the Directors of the Caledonian Steam Company.

The act further alleged that the master of the schooner immediately left Sheerness for London, stating that he would send down an anchor and cable the next day; that The Robert Bruce remained by the schooner during the night, and in the morning proceeded to the vessel she had left at anchor, and towed her to Gravesend, where

she arrived about two P. M. of the 18th, and where Barrowby met The Medora's master and her owners' agent, who stated they had not obtained any anchor and cable, and directed him to be at Sheerness by daylight next morning with The Robert Bruce, and put his own anchor and cable on board the schooner, and tow her to London; that The Robert Bruce accordingly arrived at Sheerness at six o'clock on the morning of the 19th, when Barrowby put his anchor and cable on board the schooner, and towed her to London, where she arrived between three and four P. M., the wind blowing very hard from S. W. the whole time.

On the part of the owners, the facts alleged by the *sal- [*159] vors were admitted to be true in the main, although in some parts overstated.

The admitted value of the ship, cargo, and freight was 11,431*l*. The action was entered at 2,000*l*.

Dr. Lushington (Dec. 17, 1845,) was of opinion that this was a most meritorious service; that The Medora was in great need of assistance, and that the service had been attended with labor, exertion, and even some risk to the vessel performing it;¹ and he con-

¹ In the case of The General Palmer, (July 5, 1844,) in which a salvage service had been rendered, with comparative ease, by a powerful and valuable steamer, Dr. LUSHINGTON said:—"This is the service rendered, and I am to determine whether 100*l*. be a sufficient tender. What are the circumstances to which the court is to look in solving a question of this kind? First, the degree of danger to the vessel, and the absence of all other means to rescue her; and secondly, whether what was done was effectual or not. There is no doubt of the danger, or that the means were effectual. It is most true that this service occupied but a few minutes; but what was the reason the service was of so short a duration? Because recourse was had to a steamer of 1,800 tons burden, and of extraordinary power; because she was in a condition to perform that service, which never could have been executed by any other vessel, save a steamer. I am at a loss to conceive why a patient should complain of the shortness of an operation; and yet that appears to be the only ground of complaint made against the steamer. If persons are in such a situation that it is desirable for their own safety to use a vessel of the large value of 60,000*l*. or 70,000*l*., or, if there is no necessity for having so extraordinary a power brought into action, yet surely they ought not to desire to pay less for such services than if they had been rendered by another vessel of less power, and taking a longer time to perform them, and, in all probability, not performing them so successfully. These are some of the principles on which I consider myself entitled to hold that steamers are to be paid in proportion to the value of the services actually rendered. It is not the mere time occupied; it is not the mere labor, but the real value of the services rendered. It is a truer criterion to consider what, in these circumstances, would be paid to another ship, not a steamer, of adequate power to effect the service. It never can be expected that the owners of steamers will allow their vessels to be engaged in these services, unless there be some adequate remuneration. I am of opinion, looking at the value of the vessel, that 100*l*. is not a sufficient tender, and I shall allot the sum of 250*l*."

The England. 5 Notes of Cases.

sidered that if he allotted 250*l.* and the costs, he should give a proper reward for the service.

[* 160] * From this sentence, the salvors appealed to her Majesty in council.

Sir John Dodson, Q. A., and *Bayford*, Dr., were heard for the appellants; and *Addams* and *R. Phillimore*, Drs., for the respondents.

JUDGMENT.

LORD BROUGHAM. Their lordships are of opinion, under all the circumstances of the case, that too little was given in the court below, and they, therefore, so far reverse the judgment, and give 500*l.*¹

[* 170]

* THE ENGLAND.

Cause, by Act on Petition.

February 20, 1847.

Collision. Construction and application of Trinity House Rules. Variation of ground of defence set up by plea in argument.

THIS was an action of damage, by collision, brought by the owners of *The William Broderick*, of 242 tons, against *The England*, of 393 tons. Both vessels were, at the time of the collision, between 5 and 6 o'clock in the morning of the 8th August, 1844, proceeding up the river St. Lawrence, the wind, "a good working breeze," being westerly, *The William Broderick*, in ballast, being on the starboard tack, standing to the southern shore, and *The England*, with a cargo and 150 emigrants, on the larboard tack, standing to the northern shore. The weather was thick and foggy. The owners of *The William Broderick* imputed the accident to the misconduct of those on board *The England*, alleging that, being close-hauled, she (*The William Broderick*) kept her course, and *The England* should have put her helm up, and avoided her, whereas she kept her luff. On the part of *The England* it was asserted that she put her helm down,

¹ The Committee consisted of Lord Brougham, the Master of the Rolls, Lord Campbell, Sir H. Jenner Fust, and the Chancellor of the Duchy of Cornwall (Mr. Pemberton Leigh).

and * that the other vessel did the same, instead of continu- [* 171] ing her course, and she did not keep a good look-out or blow the fog-horn ; so that the collision was either the result of inevitable accident, or the fault of the other vessel.

The court was assisted by Trinity Masters.¹

Harding, Dr., for The William Broderick. The first question is, whether the other side are entitled now to set up the plea of inevitable accident, since, in their answer to our act, they allege that the collision was "solely and entirely caused by those on board The William Broderick not having kept a good look-out, and not having taken the requisite precautions, during foggy weather, of sounding the bell or fog-horn ; and by putting her helm down, instead of continuing her course." If this change of ground be permitted, how is the court to prevent, in all cases, the line of defence set up in the act on petition being abandoned in argument ?

PER CURIAM. This objection struck me when I heard the opening on the other side, whether, having stated the ground upon which they meant to rely, another ought to be set up. I mentioned this to the Trinity Masters.

Addams, Dr., *contra*. We are coming to special pleading. The plea of inevitable accident is apparent from what we allege in the act. We plead the thickness of the fog, and that it was impossible to see more than half the length of the ship ; and is there any rule of pleading which precludes a party from arguing, upon an act so framed, that, as to The England, the collision was the result of inevitable accident, no blame being imputable to this vessel ?

Harding. According to the facts, we being close-hauled on the starboard tack, and keeping our course, The England, being on the larboard tack, *prima facie*, according to the rules of navigation, was in the wrong, and it lies on her to justify herself. The real questions are, first, as to the distance at which the vessels could be seen from each other ; second, as to which vessel saw the other first ; third, at what distance.

R. Phillimore, Dr., on the same side. It is important, if rules are laid down, that they should be strictly adhered to.

¹ Captain Wellbanke and Captain Bax.

[* 172] * *Addams*. We say that The England was to the leeward of The William Broderick at the time of the approximation of the two vessels to each other; and this allegation is not denied. We allege that, when the other vessel was seen from The England, she was close on The England's lee-bow. This plea is not distinctly and explicitly denied. But this is the point upon which the whole case turns, for if we saw the other vessel a short distance to leeward, and on our lee-bow, the rule did not apply. The application of the rule depends upon how the two vessels were approaching each other.

Bayford, Dr., on the same side. The whole of the case turns upon the nicety of the distance at which each vessel was visible from the other.

JUDGMENT.

DR. LUSHINGTON (addressing the Trinity Masters). Gentlemen, this case has been argued before you at very considerable length, and some particulars have been dwelt upon with great minuteness, the importance of which I have not been able to discover. But it is necessary that I should bring under your consideration certain matters appearing in the pleadings.

First, with regard to the delay which has been imputed to the parties who bring this action. It is abundantly clear, that, whatever may be the effect of that delay, the action was brought within time, and the court is bound to entertain the action, and determine it on the merits of the case. But it is equally true that, if the court sees that there has been too great delay in prosecuting a proceeding of this description, it always considers that, if there be any difficulty in proving the case on the one side or on the other, it ought to be ascribed to the party who has been negligent, or at least not vigilant, with regard to his own interests. On the present occasion it appears to me, that if proper measures had been followed up, the owners of The England would have been discovered much sooner than they were. I cannot conceive it possible that the owners of a vessel of between 800 and 900 tons, belonging to Liverpool, might not have been discovered by ordinary diligence. But then there

[* 173] * comes this fact, which is a great extenuation, namely, that the agent of the company to whom The William Broderick belonged, and who had been intrusted with the charge of these inquiries, became insane, and has since been confined in a lunatic asylum, and the owners could not find out what was done or not done. The utmost extent to which the effect of this delay could be

carried is this, that if it had happened that evidence could not be found sufficient to prosecute the case, then it must have failed. But it turns out that we have almost all the witnesses who could give information; so that the delay is not of any importance to the ultimate result of the case.

There is another matter of infinite importance, not only with regard to this case, but to the regularity of all our proceedings; that is, what are the Trinity House rules in such a case? I have, over and over again, with the distinct approbation of gentlemen from the Trinity House, stated the rule applicable to these cases, to the utmost of my power, in the clearest and most distinct manner I could. I apprehend it is this: Where two vessels are on a wind, that on the larboard tack is to give way to the one on the starboard tack. Now, we have had a long discussion as to whether *The William Broderick* was to windward or to leeward of *The England*. Why, if it had been broad daylight, you have always said the rule applies, whether the vessel be to the windward or to the leeward, if there be a reasonable chance of collision. Nobody ever said that the rule applied where, each vessel keeping its course, there was no chance of collision; but you are not to speculate upon the matter whether the vessel was a little to the leeward or a little to the windward; but you are to obey the Trinity House rule, even in broad daylight. Therefore, I must say I have been a good deal astonished at the long discussion as to whether the vessel was to windward or to leeward of *The England*.

I must now make an observation or two with reference to the pleadings in this case, and it is really not an unimportant matter; for, although we cannot, in this mode of conducting a cause, proceed with the strictness and accuracy observed in other modes of action, yet it is of great importance *that the facts of the [*174] case should be clearly stated, and that it should be most distinctly set forth upon what ground each party relies in seeking to obtain the decree of the court. Now the case set up on the part of *The William Broderick* was a very plain one: "You saw us in time; you ought to have put the helm up, and did not; you are to blame; we kept our luff." The answer is—"The proctor for *The England* denied that the collision was solely and entirely, or at all, owing to the negligence or want of skill of the crew of *The England*;" but he alleged "that the same was solely and entirely caused by those on board *The William Broderick* not having kept a good look-out, and not having taken the requisite precautions, during foggy weather, of signifying her presence or approach—to wit, by sounding the bell or fog-horn, and by putting her helm down, instead

of continuing her course." One would naturally understand this to mean, "We were right in what we did, and you were wrong in what you did, because, in the first place, you were negligent—you did not sound the bell or blow the horn; in the next place, you altered the helm, and the collision was solely and entirely caused by it." I had the greatest difficulty in getting over these words, because the real issue in the case is, whether it was so foggy that The England could not see. I confess I felt very strongly the objection of Dr. Harding, and I mentioned it to you, gentlemen, before it was taken. I felt it, indeed, so strongly that, but for another circumstance, I must have given it an overwhelming weight. But I find it alleged, on the part of The England, (after stating the facts nearly the same as they are stated on the other side,) "that it was impossible to see more than half the length of the ship, when a ship was seen by the wind, close on The England's lee-bow, from which she was then not further distant than about twenty yards." Now, if the act had gone on to say, in so many words, that it was perfectly impossible to have seen the other vessel till she was so close that they could not obey the Trinity House rule, and that they were forced to do the best they could

under the circumstances, it would have been all clear. But [* 175] we have to collect the defence * from the facts stated, and I am of opinion that such defence may be collected from such facts; but it is a misfortune that we should have to collect it from the facts. Nor do I see that the other party could be deceived; if I did, I must take a different view of the matter: for I find that the affidavits made subsequent to this averment contradict the statement as to the weather, and say that it was not so foggy as represented. Therefore, we are at liberty to consider both points.

With respect to The William Broderick, therefore, as far as I can form a judgment, she did nothing wrong. I put it to your judgment what was the conduct of The England, and the question is, under what circumstances she was acting. What did she do? She ought to have obeyed the rule, if she could; it is upon her to prove that her case is an exception to the rule. She says, "I could not obey the rule, because the weather was foggy," and she must prove that that was the fact. If you acquit The England, you must do it on the conviction that she has distinctly proved her averment and exception, that the morning was so foggy that she could not see the other vessel. Recollect that all exceptions to rules require to be strictly proved; and you must not relax such a rule as this.

Now, let us consider the probabilities of the case. There is one in favor of The England, namely, there is no denial of the fog on the other side; so far the probabilities are in favor of The England.

There are two other circumstances, as to which you will decide whether they are of any weight. If the weather was so extremely foggy, ought the masters not to have been on deck? Both of them were not on deck, which is strange conduct if the weather was so foggy. The other point is this: if the weather was so foggy, why proceed at all.

You will observe that it is a very nice question, because, if you believe the evidence given for *The William Broderick*, that *The England* was seen at a distance of 400 yards — *The England* being a large vessel, and the other high in the water, being in ballast — I apprehend there would have been time to have prevented the accident by obeying the Trinity *House rule. But [*176] when a man measures 400 yards at sea he is not always accurate. You will take into consideration that the master and the pilot were below, and had to come on deck; and how long we may expect it would occupy to get on deck. You will give due weight to all the circumstances of the case, not omitting the local peculiarities of the river.

CAPT. WELLBANKE. In reply to the last question, respecting the masters not being on deck, perhaps the captain had the middle watch, and the chief mate succeeded; therefore, we do not think the masters were to blame in this respect. It is acknowledged by both parties that the fog had been very thick up to the period of the collision. On the part of *The William Broderick*, some of the witnesses fix the space between seeing the vessel and the collision, at three minutes, and some at five. The master of that vessel says that, upon hearing the mate hail the vessel, he jumped out of bed and ran on deck without his clothes, and the collision occurred immediately; and *The England* alleges that she did not see *The William Broderick* until they were very near each other. Therefore, under all the circumstances of the case, we consider that they were so close when first seen, that the collision was inevitable, and we attach blame to neither party.

PER CURIAM. I dismiss *The England*, with costs.

[* 276]

* THE TEST.

Cause, by Petition.

April 16, 1847.

Collision. Where, by neglect of the Trinity House rule, on the part of a vessel bound to give way to another vessel, the latter was run down, it cannot be set up in defence that this vessel might have avoided the collision by disobeying the rule.

THIS was an action by the owners of the brig *Mayflower*, of Shields, which was sunk by a collision with the vessel proceeded against, on the morning of the 20th November, in Robin Hood's Bay, on the Yorkshire coast, when the whole of the crew on board the brig lost their lives. Both vessels had left Seaham the preceding day, and were bound to the southward, the wind blowing hard from that point. Both were close-hauled at the time, *The Mayflower* on the starboard tack, *The Test* on the larboard tack, in which state of things the rule of navigation required that *The Test* should give way, and *The Mayflower* keep her course; the latter observed the rule, but it was alleged on the part of *The Test* that, when the necessity for bearing away occurred, there was not time to wear or stay.

The court was assisted by Trinity Masters.¹

Addams and *Robinson*, Drs., for *The Mayflower*, submitted that it was a clear case of violation of the Trinity House rule: citing *The Anne* and *Jane*,² and *The Traveller*.³

Bayford, Dr., for *The Test*. The owners of *The Mayflower* have not made out their case. There was not a sufficient look-out on board that vessel.

Deane, Dr., on the same side. There are two questions in this case; first, whether *The Test*, at the time when she first saw *The Mayflower*, was in a position to wear or stay, which is a nautical question resting with the Trinity Masters. The second question is of much greater importance, namely, supposing *The Test* could or could not have altered her course, whether *The Mayflower* was justi-

¹ Captain Wellbanke and Captain Pixley.

² 2 W. Rob. 98.

³ *Ibid*, 197, 2 Notes of Cases, 476.

fied in holding on her reach to the last moment. Is the fault of one man, *however great, to dispense with care and [* 277] caution on the side of the other party? In running-down cases on land, it is not sufficient for one party to say merely, "I was on the right side of the road." So on sea, the party complaining should show that he was not at all to blame. The *Seringapatam*.¹

DR. LUSHINGTON (addressing the Trinity Masters). Gentlemen: These two vessels were both bound to the southward; The *Mayflower* was on the starboard tack, and The *Test* on the larboard tack. Both were close-hauled, and, according to the established rule, it was the duty of The *Test* to have given way, if she had the power of so doing. In the pleadings, on the part of The *Test*, it is not denied that this was her duty; but she says it was not possible for her to do so, for that she was unable either to wear or stay. As relates to The *Test*, the question, whether she is liable or not, will depend upon the opinion you shall form, as to whether the excuse she makes for not obeying the rule is valid or not. She gives you no reason; it is a simple averment.

Now let us look at the circumstances of the case. The collision takes place about half-past six on the morning of the 20th of November, and it is admitted, on the part of The *Test*, that she saw The *Mayflower* at the distance of a quarter of a mile; then the mate called up the master and the crew, who were below, and they hailed the other vessel to give way, it not being the duty of The *Mayflower* to give way, under ordinary circumstances, such as those here described. It is not represented that it was a dark night, or that there was any particular reason which prevented The *Test* from seeing The *Mayflower* in due time. As far as relates to The *Test*, I submit it to your better judgment whether you think that such an excuse—which must be established by evidence, and not be simply averred—is valid or not.

With regard to The *Mayflower*, an argument was raised *by Dr. Deane, that even supposing The *Test* to have been [* 278] to blame, The *Mayflower* was also to blame, because she might have avoided the collision if she would; and it is a principle of law that you are not to adhere to strict rules of navigation, but avoid an accident if possible. That is a doctrine, however, to be very carefully watched. I do not mean to say that any vessel is justified in coming into collision with another if she can escape it,

¹ *Ante*, 61.

because common sense and common regard to property and life establish an universal principle, that no persons must wilfully come into collision with another vessel. But it would be a dangerous doctrine to hold, without evidence, that *The Mayflower*, whose duty it was to keep her course, ought to have deviated from that rule, and given way, where there are no circumstances established by evidence to show that she ought so to have done. I cannot conceive that any thing would be more likely to lead to mischievous consequences, than to suppose that a vessel, whose duty it is to keep her course, should anticipate that another vessel will not give way, and so give way herself. The consequence would be, that there would be no certainty; whereas, the doctrine I have upheld, supported by your authority, is, that, in cases of this description, you ought always to follow the general rule. The certainty which results from an adherence to general rules is, in my opinion, absolutely essential to the safety of navigation. I think I am bound to tell you my opinion. I see no excuse on the part of *The Test*, and no reason to impute any blame to *The Mayflower*.

CAPT. WELLBANKE. We are obliged to decide this case on the evidence of *The Test* alone. *The Test* was on the larboard tack, and she acknowledges that she saw *The Mayflower* a quarter of a mile distant. It was a fresh wind, and she could readily have answered the helm. If the master of *The Test* had put up the helm at the moment he first saw *The Mayflower*, she had time to wear. A quarter of a mile is 440 yards; supposing that both vessels moved at the same speed, each had 220 yards to run. It is true that laden colliers are sluggish in wearing; they should, therefore, be [* 279] * prompt, and attempt it in due time. *The Test* did not do so, and consequently is in fault.

PER CURIAM. I pronounce for the damage, with costs.

* THE EFFORT.

[* 279]

Cause, by Petition.

April 16, 1847.

Collision. Where a steam-tug was run down by a sailing-vessel, in a narrow cut, leading to a dock, navigable only at a particular period of the tide, at which period the collision occurred; the tug, proceeding in an opposite direction, held to be to blame.

THIS was an action by the owners of the steam-tug *Dragon*, against the schooner *Effort*, for the loss of the former vessel, in consequence of a collision on the 22d April, 1846, off the Bute Dock, Cardiff. Between two and three o'clock, in the afternoon of that day, the steam-tug, belonging to Cardiff, was engaged in the Cutway, picking up a buoy, when the schooner, with a pilot on board, entered the Cutway, and struck the steam-tug, which sank.

The court was assisted by the same Trinity Masters as in the preceding case.

Addams and Deane, Drs., for The *Dragon*; *Bayford and Twiss*, Drs., for The *Effort*.

DR. LUSHINGTON (addressing the Trinity Masters). Gentlemen: Several questions arise in this case for your decision, for you will have to determine, not only whether The *Effort* is to blame, but also whether the steam-tug was to blame also.

This collision took place in daylight, about 2 P. M., on the 22d of April, at the entrance of the Bute Dock, at Cardiff. It is very probable that many considerations may suggest themselves to your mind, with reference to the locality, which I cannot pretend to form any judgment upon at all; but I am desirous, in the first instance, of calling your attention to the statement on behalf of The *Dragon*, for two purposes, asking your opinion whether, taking that statement as true, The *Dragon* did right, and The *Effort* did wrong. The steamer's account is briefly this:— That the wind was E. by S. to E. S. E.; that there was no room for the tug to pass to the leeward of The *Effort*, and they, therefore, starboarded the [* 280] helm, putting it up to the windward, close to the mud-bank on the east side. It will be for you to determine whether they were right in so starboarding the helm, and putting it to windward, close to the mud-bank on the east side: that will depend on whether there is room to pass to the leeward or not, a point on which I can form

no opinion. That is the first question. With regard to The Effort, it is alleged, on behalf of the steamer, that the helm of The Effort was starboarded also; that this was so done by the orders of Davis, who was on board, and had the charge of conducting the navigation of the vessel; that the helm was changed by the order of the master, and was put to port, and again to the starboard, by Davis's orders. If this statement be true, the helm of The Effort was changed no less than three times; and certainly it occurs to me, as a person pretending to no particular nautical knowledge, that that could not be a right course of proceeding.

The case of The Effort is this. She states that she was entering the harbor, the course of the channel leading to the dock lying N. N. E.; that she kept her head N. E. by N., hugging the weather side of the channel; that the steamer was coming down channel, on the leebow of the schooner; that she hailed the steamer to go to leeward; that there was ample room, but nothing was done till the two vessels were too close, when the steamer's helm was suddenly put to starboard. You will observe that these statements are directly at variance in some respects, but not in all. They are not at variance as to what was actually done by the steamer, but as to the time; for they both agree that the helm of the steamer was starboarded. It is further stated, on behalf of The Effort, that Davis did order the helm to be starboarded; that it was done for a moment only, not long enough for the schooner's head to begin to pay off; that the two vessels were then so close that the collision was inevitable, and the schooner's helm was put hard down. The excuse, therefore, you perceive, for starboarding the helm was, that it was done by Davis's orders; still, whether it was a right or wrong measure, they say it produced no effect, and was not the cause, or even part of [* 281] the cause, of * the collision, which, they say, was inevitable, and no blame was attached to either party.

The questions, as it appears to me, resolve themselves, in the end, to this. Was the steamer to blame for not giving way? was the excuse of want of room true or not? and, ought the steamer to have been where she was at the time, under the circumstances? So much as relates to the conduct of the steamer. As relates to The Effort, it must depend on your belief of one of two contradictory statements. If you believe that she first starboarded her helm, then put it to port, and then starboarded it again, it would appear, in my judgment, she acted erroneously; if, on the other hand, you believe that she only altered the helm for a moment, and it produced no effect in causing this collision, then no blame attaches to her.

CAPTAIN WELLBANK. This case cannot be judged of by the rules laid down for nautical practice. The collision took place in a cut leading to the Bute Dock. The tide was about half-flood; a signal was made for vessels to enter, and The Effort had passed the outer buoy. This cut is very narrow; if the statement be correct, it is not above 165 feet. It is merely a deepened channel through a mud-bank. At low water the bank is dry, and it is not navigable till half-flood. The tug placed herself in jeopardy by choosing too early a period of the tide, when vessels were coming up, which she ought not to have done. Sailing-vessels ought not to be subjected to obstructions which might cause collision, after the signal is made to enter. There is no blame attaching to the schooner. If the steam-tug, drawing less water than the schooner, could not go to the leeward, how could The Effort, drawing a greater depth of water? The steam-tug was entirely to blame; she ought not to have entered the channel at that period of the tide.

PER CURIAM. I pronounce against the claim, with costs.

*THE REPULSE.

[* 348]

Act on Petition.

April 27, 1847.

Wages of master (a co-mortgagee of the ship,) subject to a settlement of accounts with the mortgagee in possession, the original owner being bankrupt. Objection to the registrar's report.

THIS was originally a suit for subtraction of wages, instituted by Mr. Thomas Marquis, late master of The Repulse, against the ship, under the stat. 7 & 8 Vict. c. 112. The original owner of the ship, Mr. James Tomlin, (of the firm of Tomlin and Man,) in May, 1842, mortgaged her, with power of sale, to Mr. Henry Shuttleworth, to secure 5,000*l.*, advanced by him to Messrs. T. and M. Capt. Marquis, who was appointed to the command of the ship, destined upon a voyage to India, entered into an arrangement with Mr. Shuttleworth, whereby he (Capt. M.) agreed to advance 1,500*l.* upon the mortgage, giving Mr. Shuttleworth a power to act for him in his absence, and an order to sell certain teas belonging to him, and apply the balance of the proceeds (after paying certain sums) towards

meeting the sum of 1,500*l.*, such balance being ultimately the only sum advanced by him. The vessel sailed on the 15th May, 1842, and on the 13th June, Messrs. Tomlin and Man became bankrupt. The vessel returned home, after a very disastrous voyage, in January, 1845, when Mr. Shuttleworth, who had made further payments on account of the ship, under the mortgage-deed, took possession of her, and sold her for 6,100*l.* to Mr. William Phillip Beech to break up.

[* 349] * The ship having been arrested at the suit of Capt. Marquis, a proctor appeared for Mr. Beech, the present owner, who objected to Capt. Marquis's right to sue; but the court rejected his petition.¹ The proctor then appeared also for Mr. Henry Shuttleworth, and, on behalf of him and of Mr. Beech, admitted the wages to be due, subject to what was owing by Capt. Marquis upon a settlement of accounts; and the court referred the amount of the wages, together with all accounts and vouchers, to the registrar and merchants.

The registrar having brought in the report, finding a balance of 852*l.* 3*s.* 10*d.*, due to Capt. Marquis, the proctor for Mr. Shuttleworth objected thereto, on the ground that the registrar and merchants had not admitted any consideration of the accounts between Capt. Marquis and Mr. Shuttleworth, as co-mortgagees of the ship, but had confined their report to the consideration of the claim of Capt. Marquis upon the ship, contrary to the spirit and meaning of the decree of reference; alleging that the sale of the ship to Mr. Beech was made for the mutual benefit and with the full knowledge of both mortgagees, and that Mr. Shuttleworth was bound to indemnify Mr. Beech from loss, and therefore was entitled to have all accounts between him and Capt. Marquis, relating to the ship, investigated and reported upon. On behalf of Capt. Marquis, the report was also objected to, on the ground that various items had been unduly disallowed or deducted from his claims,—namely, 117*l.* on account of his forty tons of privilege freight, (as by agreement with the original owner,) 144*l.* commission on freight, (also by agreement,) and 220*l.* travelling expenses.

Haggard and *R. Phillimore*, Drs., for Mr. Shuttleworth. The report of the registrar and merchants is erroneous. The "fair settlement of accounts," directed by the court, on the former occasion,² has not been made. Captain Marquis would go away with money

¹ 2 W. Rob. 398.

² 2 W. Rob. 401.

of Capt. Shuttleworth in his pocket, (852*l.*) to resist his claims in the Court of Chancery.

* *Addams*, Dr. for Capt. Marquis. We are damnified by [* 350] the report. The court, having all the facts before it, might correct the report without further reference.

JUDGMENT. — July 28.

DR. LUSHINGTON. In this case, an act on petition has been entered into in objection to the registrar and merchants' report, which is objected to by both parties, and it is now for the court to determine whether the objections on one side and the other are tenable, and whether I am to affirm the report as it stands, or refer it back to the registrar and merchants to be reconsidered, in relation to Capt. Shuttleworth, and in reference to the balance to be paid to Capt. Marquis.

I will consider the case of Capt. Shuttleworth in the first instance, and that is a case of precedent and practice, and amounts to neither more nor less than a question whether certain specific items ought or ought not to be allowed. The registrar and merchants, in considering the reference made to them, have thought it right to confine their report to such matters as occurred between Capt. Marquis and Capt. Shuttleworth, not dealing with the questions between Capt. Marquis and the original owner of the vessel.

Now it is necessary to consider the peculiar circumstances under which this case came before the court — for most peculiar those circumstances were. Suppose the case had stood thus: the original owner was Mr. Tomlin, and he became bankrupt at a very early part of the transaction. If the ship had remained in the original hands, I apprehend, had she been arrested at the instance of Capt. Marquis, and the assignees of Mr. Tomlin had appeared and given bail, under the statute,¹ Capt. Marquis, as master, might have claimed a right to proceed against the vessel itself, and I should be bound, if advances had been made to Capt. Marquis, to have referred his demands to the registrar and merchants to report on. But I should have had no hesitation in telling the registrar and merchants that whatever Capt. Marquis had received, and whatever was due from him, on * account of the ship, during the voyage, ought to be taken [* 351] into the account; otherwise I should be acting in a manner repugnant to the soundest principles of justice. I can hardly conceive any thing more unjust than that I should enforce a claim

¹ 7 & 8 Vict. c. 112.

against the owner of the vessel, and, to recover an equally good demand on his part, connected with the same transactions, compel him to have recourse to a suit in equity or at law. The ordinary practice is, where a mariner sues a ship for wages, that whatever has been advanced on account of his family, whilst he is absent, or to himself, is always taken into account. In the present case, Capt. Shuttleworth was mortgagee of the vessel in possession; in fact, he was owner of the vessel, the original owner having been bankrupt during the time of the various transactions between Capt. Marquis and Capt. Shuttleworth. The vessel came to this country and was sold by Capt. Shuttleworth to Mr. Beech, (he having a power of sale,) and after it was sold to Mr. Beech, the vessel was arrested here, and consequently it came before me in June, 1845, and I had not any doubt in my own mind that Capt. Shuttleworth had a right to appear in the case. Mr. Beech, though owner of the vessel, by purchase from Shuttleworth, had nothing whatever to do with any of the antecedent transactions, and if a decree had gone against the vessel itself, Shuttleworth, as vendor of the vessel, must have made good to Beech the expenses he had been at. I admitted Capt. Shuttleworth to be a party in this court, without regard to any act of parliament at all, upon the universal principle, because his interest was at stake, and to that principle I adhere. The registrar and merchants, in looking at the transactions, seem to have entertained a doubt as to the extent of the jurisdiction of this court; and I agree with them, that difficulties might have occurred. I was not unaware of those difficulties, but I was fully determined to encounter them, otherwise I could not do justice at all. The registrar and merchants may, with good reason, perhaps, apprehend that I am going too far upon this occasion. I am going to this length: to refer back the

report to the registrar and merchants for further consideration of the * accounts between Shuttleworth and Marquis, [* 352] as to the transactions of the ship on that voyage. It would be useless for me to attempt to discuss the particular items; but I wish the registrar and merchants to take into account every thing which in law or equity would be due and owing to Capt. Marquis, on account of the wages he claims, and every thing due and owing from Capt. Marquis to Capt. Shuttleworth, on account of the transactions of the ship during this voyage. If this was not done, I should leave a remnant for a court of equity to deal with, and it would have been much better not to have proceeded at all. My object is to settle all the accounts between the parties relative to all the transactions, and whichever way the balance is, it ought to be paid. The registrar and merchants will reconsider the question, so

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that I may decide upon the objections to the items. I think it better that I should not pronounce any judgment as to the items now, but refer back the report generally. If the report comes back as it is, I must determine how far the objections as to the items are well founded; but I wish the registrar and merchants to reconsider these items.

The registrar brought in a further report, stating that there was due from Capt. Marquis to Mr. Shuttleworth, on the settlement of all the transactions and accounts, 654*l.* 4*s.* 1*d.*, according to the following schedule:

	£.	s.	d.
Account of disbursements of Mr. Shuttleworth, mortgagee in possession, acting as owner, including his advance of 5,000 <i>l.</i> on mortgage of the vessel; premiums of insurance, commissions, outfit, wages, interest on his advances, &c., as agreed upon with the owners, under a deed of mortgage, dated 4th May, 1842	11,773	3	9
Further account of disbursements as per account of T. Haviside & Co. brokers of the ship	331	15	5
Account of wages, privileges, commissions, and disbursements due to Capt. Marquis, by former report, now again adopted on reconsideration.	852	3	10
	£12,957	3	0
* Less	[* 353]		
Amount received by Mr. Shuttleworth, net proceeds of sale of ship to Mr. Beech	6,039	0	0
Amount paid thereout to Messrs. Gladstones & Co. for pilotage, wages, salvage, and a bottomry bond	3,000	0	0
	3,039	0	0
Received by him from Messrs. T. Haviside & Co. for balance of freight account, &c.	1,632	8	9
Overcharge in interest account, compound interest being disallowed	113	1	4
Received by Mr. Shuttleworth for returns of premiums of insurance	267	3	8
	5,051	13	9
Loss on mortgage	£7,905	9	3
By virtue of an undertaking contained in a letter, dated 5th May, 1842, addressed to Mr. Shuttleworth by Capt. Marquis, he undertakes to provide Mr. Shuttleworth with funds to the extent of 1,500 <i>l.</i> , for his share of the mortgage, and to bear his proportionate share of loss (if any) that may arise from such mortgage: the loss above stated is therefore divided as follows, namely:—			
Mr. Shuttleworth's share on £3,500	5,533	16	9
Capt. Marquis's share on 1,500	2,371	12	6
	£5,000		
	£7,905	9	3

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Due to Mr. Shuttleworth by Capt. Marquis, his proportion of loss on mortgage, as before stated	£2,371 12 6
Deduct	
Amount received by Mr. Shuttleworth from Parker and Sons, arising from the sale of tea belonging to Capt. Marquis, sold by his authority, and for his account	1,875 4 2
Payments made by him to Capt. Marquis and others, for his account also	1,128 2 9
	<hr/>
	747 1 5
Add	
Interest allowed as agreed upon	118 3 2
	<hr/>
	865 4 7
Wages, &c., due to Capt. M., as per former report, now adopted	852 3 10
	<hr/>
	1,717 8 5
Balance due to Mr. Shuttleworth by Capt. Marquis	<hr/>
	£654 4 1

[* 354] * This further report was objected to by Capt. Marquis. (with reference to the division of the loss arising from the mortgage,) on the grounds that, under the deed of mortgage, there were secured to Mr. Shuttleworth, as the mortgagee, interest at 7½ per cent. on the 5,000*l.*; 2½ per cent. commission on the ship's earnings (charged by him on 19,500*l.*); and ¼ per cent. commission for effecting insurances (charged by him on 48,000*l.*); that, by Capt. Marquis's letter to Mr. Shuttleworth, he requested him to apply the balance of the proceeds of the sale of his teas towards making up the 1,500*l.*, on the understanding that he (Marquis) was to receive 10 per cent. per annum by way of interest on the said balance, in consideration of his thereby undertaking to bear his proportionate share of loss (if any) that might arise from such mortgage; that Mr. Shuttleworth retained the balance of the proceeds of the sale of the teas, (namely, 804*l.* 10*s.* 5*d.*) towards making up the 1,500*l.*, and no other sum was advanced by Capt. Marquis to Mr. Shuttleworth, in respect of the 1,500*l.*; that in the account of "disbursements" of Mr. Shuttleworth is included 2,000*l.*, which was lent by him, on his own account, to Tomlin, the former owner, and to which advance Capt. Marquis was no party; that, in November, 1842, Mr. Shuttleworth became, and thenceforward acted as, owner of the ship, subsequent whereto the losses referred to in the report were sustained, in the expenditure and management of the ship, and not from the mortgage, so that he, (Capt. Marquis) if liable to any share of the losses.

is only so in the proportion of 804*l.* 10*s.* 5*d.*, the sum actually advanced by him to Mr. Shuttleworth. On behalf of Mr. Shuttleworth, it was alleged, in reply, that all the matters set forth in objection to the report, are matters of account arising out of the mortgage, and the trading with and navigating the ship, and had been fully considered by the registrar and merchants; that Capt. Marquis, besides the 10 per cent. interest on the balance in the hands of Mr. Shuttleworth, received other advantages, to wit, his appointment (through the instrumentality of Mr. Shuttleworth) to command the ship, to which various emoluments were incident, according * to agreement, which were an equivalent for those [* 355] set forth as accruing to Mr. Shuttleworth; that the teas left by Capt. Marquis to be sold by Mr. Shuttleworth, produced 1,875*l.* 4*s.* 2*d.*, but the drafts of Capt. Marquis and other claims upon the proceeds reduced the balance to 804*l.* 10*s.* 5*d.*; that the 2,000*l.* referred to as advanced by Mr. Shuttleworth to Tomlin, was a payment made by him on account of wages and necessities supplied to the ship, to enable her to proceed to sea, and was a transaction growing out of the mortgage, and to the advantage of Capt. Marquis; that in November, 1842, Capt. Marquis was still a co-mortgagee of the ship, and that the losses arose out of the whole transaction of the mortgage, and were in a great measure occasioned by the unnecessary expenditure and other mismanagement of Capt. Marquis.

Addams, Dr., for Capt. Marquis. It is not denied that any fair balance should go in diminution of Capt. Marquis's claim; but he is responsible for no more than the sum he actually advanced; he has nothing to do with the 2,000*l.*; and, whatever losses were incurred, in consequence of the trading of the ship abroad, which was for the benefit of Capt. Shuttleworth, (who became owner upon the bankruptcy of Tomlin and Man,) must not be brought into account against Capt. Marquis.

Haggard and R. Phillimore, Drs., contra. The question is, whether there is sufficient legal evidence that the contract of Capt. Marquis was to extend to 1,500*l.*, or only to the amount of the balance of the proceeds of the tea; what, under the circumstances of the agreement, was to be Capt. Marquis's proportion of the loss, if any? We contend that Capt. Marquis undertook to advance, not the balance of the teas, but 1,500*l.*, and under the contract he was liable to that proportion of the loss, as joint mortgagee.

PER CURIAM. I must take time to consider this case.

JUDGMENT.

DR. LUSHINGTON. I cannot satisfactorily dispose of this case without briefly recapitulating the facts whence the litigation has arisen, and stating the proceedings which have been had; but I [* 356] shall do so only so far as I think is absolutely * necessary to bring out clearly the questions which remain to be decided.

The suit is brought by Capt. Marquis, who had been the commander of The Repulse, for his wages earned on board that ship, and this proceeding is had under the 16th section of 7 & 8 Vict. c. 112. The court has already decided¹ that, notwithstanding all previous transactions, and the sale of the ship especially, Capt. Marquis was entitled to maintain such suit, and also that Capt. Shuttleworth, who was the mortgagee in possession, and sold the ship, had a right to appear in this court for the purpose of seeing that the amount of wages was properly ascertained, and of substantiating any counter demands which could, with justice, and according to law, be set off against the claim for wages, Capt. Shuttleworth being in effect the owner of the ship, and whatever should be paid to Capt. Marquis, on account of wages coming out of the property and pocket of Capt. Shuttleworth.

The cause proceeded on this footing. A reference was made to the registrar and merchants, who made a report accordingly; that report was objected to on both sides, and came under the consideration of the court on the 28th July, 1846. It was referred back for further consideration, on the objections taken by both parties. A second report was made, which is objected to by Capt. Marquis only, and I have to determine whether the objections are well founded, or, in other words, whether, in my judgment, the account is well taken.

This is a general view of the case; but I must now necessarily descend to particulars. The first report found a balance of 852*l.* 3*s.* 10*d.* to be due to Capt. Marquis. The second report found a balance of 654*l.* 4*s.* 1*d.* to be due to Mr. Shuttleworth. The difference between the two reports arose from this—that, in the first report, the mortgage and any loss therefrom were wholly excluded. In the second report they were included. In all other respects, the registrar and merchants adhered to their original report. [* 357] * This account, therefore, by the second report, stood thus—that a balance was due to Mr. Shuttleworth of 654*l.* 4*s.* 1*d.*

¹ 2 W. Rob. 398.

The proctor for Mr. Shuttleworth prays that this report be confirmed, and the proctor for Capt. Marquis objects to the mode in which the mortgage account has been taken, and also repeats his objections to the deduction of various items of small importance.

Before I decide the first question, I must observe upon the agreement entered into between Capt. Marquis and Mr. Shuttleworth. Such agreement is the whole foundation of Mr. Shuttleworth's demand. It is admitted that some agreement was entered into, and the court must inquire how that agreement was constituted, then the effect and true construction of it, and, lastly, if the mode adopted by the registrar and merchants of taking the accounts be conformable to the agreement, and also consistent with law and practice.

I must, to make the statement intelligible, shortly advert to the state of circumstances which led to the agreement. It appears that this vessel was the property of Messrs. Tomlin and Man, and that, prior to 1842, it was mortgaged for a large sum of money; that Mr. Shuttleworth undertook to pay off the existing mortgage, and to advance other moneys; but, for the precise effect of this engagement, I must look, not to what is alleged or sworn, but to the mortgage-deed itself, which is the sole legal evidence of the obligations of the parties under it. It was also agreed between Mr. Shuttleworth and Messrs. Tomlin and Man, though not by deed, that Capt. Marquis should be appointed to the command of this vessel, then destined on a voyage to the East Indies. How far this was or was not a valuable appointment, appears to me to be of no importance to the decision of the questions under consideration. The value of the appointment, be it more or less, cannot affect or alter the arrangements either of Mr. Shuttleworth with Messrs. Tomlin and Man, or the arrangement made between Mr. Shuttleworth and Capt. Marquis.

The next question is, whether Capt. Marquis, to any and what extent, became a party to this deed of mortgage. By the * term "party," I of course do not mean a party to the deed [* 358] itself, because he was not so, but was he bound by an engagement to take a share in it—to have a share of the advantages and bear a part of the losses? This transaction is between Mr. Shuttleworth and Capt. Marquis only. The agreement, if there be any legal agreement, is constituted by the two letters to which I shall presently refer. I cannot entertain any reasonable doubt that this is a valid agreement; indeed, I must say this is an admitted point on both sides, and the only question debated and argued by the learned counsel was as to the interpretation and construction of the agreement.

The first letter is dated the 5th May, 1842; it is written by Capt. Marquis to Mr. Shuttleworth, and it is as follows:—

London, 5 May, 1842.

Dear Sir,

Having left with you my power of attorney to act for me in my absence, and also an order to sell my teas, I have to request, after paying the sums before mentioned, you will apply the balance towards meeting the sum of 1,500*l.*, that being the amount I was to advance on the mortgage of the ship *Repulse*, as agreed between us; and, to prevent any mistake, it is understood I am to receive 10 per cent. per annum, by way of interest on the said balance, in consideration of my hereby undertaking to bear my proportionate share of loss (if any) that may arise from such mortgage. I am, Dear Sir, yours truly,

THOS. MARQUIS.

To Mr. Henry Shuttleworth.

Now the effect of the letter I take to be this: first, that Capt. Marquis had agreed to advance the sum of 1,500*l.* on the mortgage of the ship, the deed of which is produced in these proceedings: secondly, that Mr. Shuttleworth was to sell some teas belonging to Capt. Marquis, and, after paying certain sums, (not in that letter mentioned,) apply the balance towards meeting the sum of 1,500*l.*; thirdly, that 10 per cent. was to be the interest on the balance; fourthly, that this interest was to be paid in consideration of Capt. Marquis bearing his proportionate share of the loss, if any, which might arise from such mortgage.

[* 359] * Upon the meaning of this letter, I will at present only observe, that I apprehend that, by the proposition contained in it, the mortgage is clearly identified, and that Capt. Marquis must be bound by the provisions of the mortgage deed, so far as his share extends, whatever these provisions may be. I postpone all observations as to the meaning of the word "proportionate," on which the chief difficulty arises, until I have considered the second letter; for the agreement is not contained in one letter, but in the two letters taken together.

The second letter is dated 10th May, 1842, and is written by Mr. Shuttleworth to Capt. Marquis. I apprehend it is quite clear that this second letter was intended to be an answer to that of the 5th May, and was also intended by Mr. Shuttleworth to express in a more detailed form the agreement he purported to enter into with Capt. Marquis. The letter, however, does refer to some particulars not specifically mentioned in the former letter of May 5th, from

Capt. Marquis, as the specification of the teas, and as to payment to Capt. Macqueen of 671*l.*, with interest ; and it contains (for it is not necessary to read the whole) these words :—“ The net proceeds of the tea, after deducting for the payment of all such orders as you may give upon me, is to go towards the 1,500*l.*, as your share in the mortgage of the ship Repulse, it being understood that whatever balance remains of yours in my hands, after payment of the above sums, is to be considered as invested in that mortgage.” Then follow the words :—“ You taking part in the risk or loss, should any occur, in consideration of which, you are to receive interest at 10 per cent. per annum for all sums (not exceeding the 1,500*l.*) of money as may remain in my hands, after payment of the before-mentioned orders.”

Now the question, whether Capt. Marquis's share of the loss shall be computed upon 1,500*l.*, or upon the sum he actually advanced, may depend, in the first instance, and must depend, upon the meaning of these two letters. Is it not clear that there was a direct agreement to advance 1,500*l.* ? I do not apprehend that any person who reads the two letters carefully over could come to a different conclusion. * Suppose nothing had been said as to the [* 360] teas, and suppose no money paid by Capt. Marquis, and consequently that he had not fulfilled the agreement at all, and suppose a loss had then occurred upon the mortgage, I apprehend that the total non-fulfilment of the agreement could not have exonerated him from bearing his share of the loss ; and though that share would be estimated with some reference to the proportion that 1,500*l.* bears to the whole mortgage, how it would be estimated, or at what precise amount, is by no means so clear.

I am aware that, in certain respects, a different view, but not, I think, essentially different, has been taken of these letters, and no doubt it is possible to contend that, although 1,500*l.* was the sum named, yet that it was stated only to negative a right to advance more, and that payment was to be derived from the balance of the teas only, and the interest of 10 per cent. and risk were to be confined to the amount of such balance. That was the argument of the learned counsel for Capt. Marquis. Now it may be well to consider the consequences of both constructions. In the first case, if there be a positive agreement to advance 1,500*l.*, Mr. Shuttleworth would be entitled to demand and have payment of that money, and that Capt. Marquis should bear a loss in some way, (I do not say in what,) in the proportion that 1,500*l.* bears to the whole mortgage ; and Capt. Marquis could not divest himself of this responsibility by not paying what he had undertaken to pay. In the second case, the agreement

would, in effect, be of a totally different nature ; it would not be an agreement to advance 1,500*l.* at all, but to advance so much of the balance of the teas, more or less, not exceeding 1,500*l.*, and to bear the loss in the proportion that the sum paid bore to the whole mortgage. I confess I cannot extract this meaning from the letters. I think there is an absolute stipulation to advance 1,500*l.*, though, very probably, the expectation of the parties, but not the expressed agreement, was, that the balance arising from the teas should be the only fund for payment, that being supposed at the time to be an adequate fund.

There is another way of construing the two letters. [* 361] namely, *that the agreement was to advance 1,500*l.*, but that the loss should be only in proportion to the sum advanced, as interest at 10 per cent. should only be paid on the sum actually advanced. But this, in effect, would be only to put the former proposition in another shape, and to say that there was no stipulation to advance a sum of 1,500*l.* at all. In fact, such a construction would annihilate the stipulation for the advance of 1,500*l.* and would, I must think, violate the express terms of the letters themselves ; and if I find, as I believe I do, one clear stipulation, I must, I conceive, in a case of doubt, construe the doubtful part so as not to destroy what is clear. It is to be observed that both letters speak of the balance arising from the sale of the teas being "applied towards meeting the sum of 1,500*l.*" — these are the very words of the first letter. The second letter does not differ from the other: "is to go towards the 1,500*l.*," are the terms used in the second letter. Had the parties intended that the balance should be the whole sum invested, provided it did not exceed 1,500*l.*, they ought to have said so ; but they have not: *quod voluere non dixere*. I am well aware that it is very difficult to put, with confidence, precise meanings on agreements so loosely worded ; but if parties will so negligently conduct their own affairs as to leave such matters in doubt, they must submit to the consequences ; and I regret to observe the extreme, and I may say, extraordinary, carelessness with which both parties express themselves. In the one letter it is called "proportionate share of loss." Proportionate to what ? In the other letter, "part in the risk or loss," without the slightest specification as to what is meant in the first letter by "proportionate share," or in the other by "part in the risk or loss."

I agree with the registrar and merchants, and am very clearly of opinion, that the letters do contain an agreement to advance 1,500*l.* and that agreement has been violated by the advance of a less sum of money ; but I think it does not, therefore, follow that, in an ac-

The Repulse. 5 Notes of Cases.

count between Capt. Marquis and Mr. Shuttleworth, I can confirm the report, computing the loss in the proportion that 1,500*l.* bears to 5,000*l.*, and not as 804*l.* 10*s.* 5*d.* (the sum actually advanced) *bears to 5,000*l.*; and for the reasons I am about [* 362] to state. I apprehend that the question of what loss Mr. Shuttleworth has sustained by the breach of the agreement, is not matter of account at all, but a question of unliquidated damages, which cannot be made matter of account, and the amount of which a jury alone can ascertain. For though it is true a jury, in estimating the damages, may adopt the report of the registrar and merchants, (they may or may not,) I have no power to do so, and I am not aware that the Court of Chancery has the power to estimate itself unliquidated damages.

I feel myself, therefore, compelled to come to the conclusion, that in this respect, I must alter the report, not because I differ from the registrar and merchants in the construction they have put upon the letters, but because I am of opinion that the amount of the loss must be computed, as unliquidated damages, by another tribunal. For these reasons, I consider that the report must be altered, and I direct that the loss be taken on the sum of 804*l.* 10*s.* 5*d.*, in the proportion that sum bears to 5,000*l.*, and not as 1,500*l.* bears to 5,000*l.*

The next point of the case is, whether the 2,000*l.* advanced by Mr. Shuttleworth to pay for the provisions of the ship, is to be considered as a payment made under the mortgage deed. I will first observe, that, from the letters, it appears that the mortgage deed of the 4th May (for the letters refer to it) was the mortgage deed referred to, and I am of opinion that, whatever may be the contents of that deed, both parties are bound thereby. It may be that neither party *de facto* read the deed, or was cognizant of its contents; but having referred to it in letters constituting an agreement, it must be binding upon them. That deed provides for the advance of any sum of money, not exceeding 10,000*l.*, and amongst other purposes, specially points out advances to be made by Mr. Shuttleworth, for the provisions, stores, and outfit of the ship. Now it is not denied that 2,000*l.* was advanced for such purpose, and therefore I think must be considered as advanced on account of the mortgage, and a loss incidental to it and under it.

*These considerations alone, independent of all others, [* 363] would lead my mind to, and justify, the conclusion to which I have come. But the letter of May 10th puts the matter out of all question, for it proves not only that Capt. Marquis, through the medium of that letter alone, (as well as in other ways,) knew that this 2,000*l.* was to form a payment under the mortgage, but that it

was to be paid out of the joint proceeds. I do not advert to the affidavits, but to the agreement itself: "You will understand that the first sum of money you may receive on the ship's account is to be remitted to me, it being the agreement between myself and Capt. Tomlin, that 2,000*l.*, with the amount of insurances, &c., shall be paid off as early as possible, and only the sum of 5,000*l.* remain on mortgage, that being the extent originally agreed upon: the mortgage extends to the freight, as well as on the ship." Now it is quite clear that Capt. Marquis entered into this part of the agreement with his eyes open, and was aware that Mr. Shuttleworth had advanced this 2,000*l.* under the mortgage, and that it was to be paid up in the first instance; and if not, the loss was incidental to the mortgage, and covered by the mortgage, and no doubt Capt. Marquis assented to this letter: so that he has not, either in law or equity, the slightest claim to be exonerated from bearing a share in this loss of the 2,000*l.* I therefore adhere to the report of the registrar and merchants, with respect to this item.

I now proceed to dispose of what I may call three sets of items objected to, and the solution of the questions which arise upon those items mainly depends upon the agreement entered into between Messrs. Tomlin and Man and Capt. Marquis, on the 2d May, as to his having the command of the vessel, and that agreement, where it is particular, must govern the claims of Capt. Marquis against the ship, for his privilege and emoluments. Of course Capt. Marquis cannot be entitled, as against Mr. Shuttleworth, in this matter, to any more consideration than against Messrs. Tomlin and Man, if they had remained solvent. Now the registrar and merchants have

disallowed a charge made by Capt. Marquis, on what is
[* 364] called his privilege account, of * 117*l.* 10*s.* 2*d.*, from Bom-

bay to China, which they consider an overcharge. I understand the facts to be these. Capt. Marquis did not himself, for the purpose of carrying on a private adventure, employ any part of the privilege tonnage allowed by the agreement, but the whole tonnage was appropriated to the ship's account. The agreement as to the privilege tonnage is this: "Forty tons of privilege freight, free all round, and in case of the ship being chartered by government, or otherwise, the same rate per ton to be allowed to Capt. Marquis for his tonnage, as may be paid by the charterers, or a sum equal to that which it would have produced had he retained it." That is, there was to be allowed to the master so much room on board the ship for the purpose of loading his own cargo, in any private adventure in which he might think fit to engage; and if he did not think fit to avail himself of any of it, and the tonnage went to the account of

the ship, he should be at liberty to claim a certain sum of money in proportion. I apprehend the proportion to be this:—the proportion which forty tons bore to the whole tonnage of the ship, whatever it might be. These are the words: “Forty tons of privilege freight, free all round, and in case of the ship being chartered by government or otherwise, the same rate per ton to be allowed to Capt. Marquis for his tonnage as may be paid by the charterers, or a sum equal to that which it would have produced, had he retained it.” These are not very clear expressions; but the meaning I understand to be this: If you do not avail yourself of your privilege, and the whole of it is employed on the account of the ship, you are to be paid such a sum of money as the proportion of forty tons bears to the whole tonnage of the ship. In the present case, the tonnage of the ship was 1,600 tons, and, according to this principle, the claim of Capt. Marquis would be according to the proportion which 40 bears to 1,600. The registrar and merchants have reported that Capt. Marquis is entitled only to a proportionate part of the freight, according to the terms of the letter; whereas, Capt. Marquis contends, as I understand, that he is entitled to be paid, not in proportion to the whole freight, but in proportion *to a part which bears a higher [*365] rate. There may possibly be some ambiguity in this part of the agreement; but, without evidence that any injustice has been wrought to Capt. Marquis by the report, I cannot overrule it. I am not satisfied that it is founded upon an erroneous principle; on the contrary, I think that the true meaning is, that the two expressions are synonymous.

The next item is a sum of 114*l.* 2*s.*, commission charged on freight from Calcutta to England, which is claimed under the following passage in the agreement between Capt. Marquis and Mr. Tomlin: “And should the ship return direct from India, Capt. Marquis to be allowed 2½ per cent. commission on freight.”

Now the vessel sailed originally from a port in England, and did not return direct to England, but circuitously, going to China. The claim of Capt. Marquis could arise only in the event of the vessel's returning direct to England, and it is an admitted fact that there was an intermediate voyage. It is wholly impossible, therefore, to admit this charge, and I adhere without hesitation to the report of the registrar and merchants, who have disallowed it.

There is one more objection. The registrar and merchants have disallowed 220*l.*, and allowed 181*l.* 17*s.* 6*d.*, under the head of “Travelling expenses at the Cape on bottomry, and expenses on shore in India, China, &c.” These expenses, I apprehend, cannot be governed by any thing I find in the agreement, saving so far as the following

words can be considered as applicable: "Capt. Marquis to be allowed his customary expenses in port;" in other words, he is to be allowed his customary expenses; but as to what those customary expenses are, the agreement is utterly silent. I have no evidence before me that the report is erroneous, or that the charges have not been properly disallowed. I cannot enter into the items charged by Capt. Marquis and disallowed by the registrar and merchants; but I must say that the allowances appear to be made on a most liberal scale, and I have no hesitation in pronouncing against this objection made by Capt. Marquis.

The result then is this: in one respect, and in one only, [*366] * (though that is a very important one,) I must alter the report. In all other respects, I confirm it. I shall not refer it back, not wishing to put the parties to more delay and expense. I shall alter the report in the following manner. It appears the loss, according to the second report, amounts to 7,905*l.* 9*s.* 3*d.* I conceive this loss must be borne in the following way: Mr. Shuttleworth must bear his loss in the proportion that 4,195*l.* 9*s.* 7*d.* bears to the whole amount of 5,000*l.*, and Capt. Marquis must bear his loss as 804*l.* 10*s.* 5*d.*, the amount he actually advanced, bears to the 5,000. The consequence will be, that Mr. Shuttleworth's loss will be 6,633*l.* 9*s.* 7*d.*, and Capt. Marquis's 1,271*l.* 19*s.* 8*d.* But to make it clear, I will show how the account stands.

The report states that there was due to Capt. Marquis for wages, &c., 852*l.* 3*s.* 10*d.* Then he advanced the amount of the balance of the sale of the teas, which, with interest at ten per cent., (which he was entitled to under the agreement,) amounts to 865*l.* 4*s.* 7*d.*; making together 1,717*l.* 8*s.* 5*d.* From this must be deducted his loss, in the proportion which 804*l.* bears to 4,195*l.*, or 1,271*l.* 19*s.* 8*d.*, and the result will be, that there is due to Capt. Marquis 445*l.* 8*s.* 9*d.*

I now come to the question of costs, and, looking at the proceedings which have been had in this case, I am anxious to find some legal principle upon which I could dispose of the question of costs in so complicated a case. The general principle is, that whoever succeeds shall receive his costs from the other party. Costs are not given in the shape of a penalty, as a matter of punishment, but as an indemnification to the party who succeeds in the suit,—because he is right and the other in error, and the party who has sustained wrong ought not to be subjected to expense in seeking a remedy. That is the true principle upon which costs are given. But here the parties are sometimes right and sometimes wrong, and if I were to deal with the costs upon the general principle, I might do injustice. Therefore, I ought to apportion the costs of the different hearings

according to the principle I have laid down, namely, the * principle of success, as far as it is applicable to the circum- [* 367] stances.

At the first hearing of the case, Mr. Shuttleworth objected to Capt. Marquis being entitled to sue the ship on account of his wages. I was of opinion that Mr. Shuttleworth was wrong, and pronounced against the validity of that objection, and the costs of the first hearing. I am of opinion Mr. Shuttleworth must pay. At the second hearing, the first report was objected to by both parties. Mr. Shuttleworth objected to this report that the accounts between himself and Capt. Marquis, as co-mortgagees of the ship, had been left out of consideration, and Capt. Marquis objected to the omission of certain items; I thought that Mr. Shuttleworth was right and Capt. Marquis wrong; and, therefore, I give Mr. Shuttleworth the costs of that hearing. With regard to the present decision, upon the second report, it is substantially in favor of Capt. Marquis, and I think that he is entitled to the costs of this hearing.

One matter still remains. Capt. Marquis, in all ordinary circumstances, would be entitled to pray at the hands of the Court a monition (as bail has been given) for the payment of the amount of money which I have pronounced due to him under the accounts. But I must not lose sight of the fact, that an action may be brought upon the breach of the agreement for unliquidated damages, because I think Mr. Shuttleworth right in substance, though wrong in form. Being so, I shall adopt the course pursued by my predecessor, Lord Stowell, in a case similar, not in circumstances, but in principle, and I shall not allow the monition to issue for one month, giving Mr. Shuttleworth that time to decide whether he will bring his action, and if he does not at the end of one month, I shall grant the monition.

The Proctor for Mr. Shuttleworth.

[Mr. Shuttleworth is in India: it is quite impossible to communicate with him in that time.]

I cannot give longer time; there would be no end to the case.

[* 368]

* THE GEORGE.¹*Cause, by Act on Petition.*

May 6, 1847.

Collision. A vessel, A, on the starboard tack, with the wind three points free, at night, descries another vessel, B, ahead, close-hauled, on the larboard tack, approaching, but so far to windward that, believing if B kept her course they would have gone clear, she did not give way (whereas B ported her helm,) and the vessels came in collision. *Held*, that A was in fault and B did right.

THIS was a cause of damage by collision promoted by the owners of the schooner *Globe* against *The George*. The accident occurred about half-past six o'clock, P. M., on the 18th of December, 1846. The *Globe* had left Stockton-on-Tees that day, coal-laden, bound for Topsham, and when off the Whitby Light, discerned *The George*, in ballast, from Shoreham to Hartlepool, on her leeward bow, according to her account, distant a quarter of a mile. The wind was W. S. W., three points free for *The Globe*, which was on the starboard, *The George* on the larboard tack. The master of *The Globe*, considering that the vessels would go free, kept his course, but, soon discovering that *The George* was coming stem on, he altered the helm a-weather: before it could take effect, the collision occurred, and *The Globe* was cut nearly through. On the part of *The George* it was alleged that, when she first descried *The Globe*, the vessels were approaching each other stem on, and, being on the larboard tack, she obeyed the Trinity Rule, and ported her helm.

The Court was assisted by Trinity Masters.²

Addams and *Twiss*, Drs., for *The Globe*; *Sir J. Dodson*, Q. A., and *Bayford*, Dr., for *The George*.

DR. LUSHINGTON (addressing the Trinity Masters). — It is necessary that I should request your opinion upon two distinct points. With regard to the facts of the case, it appears to me that there are not many matters upon which the evidence really differs. The ques-

¹ S. C. on Appeal, 6 Notes of Cases, 53.

² Captain Hayman and Captain Farquharson.

tions of fact upon which there is discordant evidence are, first, whether the vessels were approaching stem on, or The George was considerably to the windward of The Globe; secondly, what was the description of the night—whether very dark and hazy, or of an ordinary kind; thirdly, in what manner the two vessels actually came into contact. How far these questions may be of importance in guiding your opinion to enable us * to come to a [* 369] right conclusion on the case, will be for discussion presently.

There are some very important facts admitted on all sides, and I will first call your attention to what is stated in behalf of The Globe, and with a view of at once putting to you these questions,—whether, if all be true which The Globe states, she conducted herself according to the proper rules of navigation. According to the statement of The Globe, she was proceeding from Stockton-on-Tees to Topsham, pursuing her course S. E. by S., with the wind W. S. W., three points free. She was on the starboard tack, and saw a light from the vessel approaching her, three points upon the lee bow. She states that, at that time, the distance between the two vessels was a quarter of a mile. That being the state of the facts, what did she do, according to her own statement? Nothing. The first question which arises with respect to the conduct of The Globe is, having seen the vessel approaching, whether, having the wind three points free, she ought not to have given way, and thus avoided the chance of collision? The answer on the part of The Globe is this: “We kept our course because we saw that the other vessel was so far to windward of us, that if such vessel had kept her course, we should have gone at least 100 fathoms free.” That might bring us to this consideration—one that has often occurred in this Court—namely, when two vessels are approaching each other at night, when it is almost impossible to decide with absolute certainty, if they keep their respective courses, whether a collision will take place or not, is it not the duty of a vessel to take every possible precaution to avoid a collision, and not to trust to the mere chance, that, if they keep their respective courses, they will go clear? The first question will be, whether The Globe, seeing a vessel approaching, ought not to have ported her helm and given way. But there is another circumstance. The master says, being satisfied that the two vessels would pass, he directed his attention to the vessel ahead. You will consider whether that was a prudent mode of acting, when he saw the vessel was * approaching. He then finds The [* 370] George is approaching, and what does he do? He puts his helm hard-a-weather.

The first question I shall have to ask you is, whether you think

that, in the two particulars to which I have called your attention,—doing nothing in the first instance, and then putting the helm hard-a-weather,—he was right. You will recollect that they were a quarter of a mile distant, and no more, when the vessels were approaching.

Now, let us consider the defence on the part of *The George*. She was close-hauled on the larboard tack: I wish to call your attention particularly to this. It is said that, being on this tack, she ought to have kept her course, and the other vessel, steering S. E. by S, having the wind free, ought to have got out of the way. That is the way it is put by the counsel for *The George*. Now, I take it to be quite true, that where a vessel has the wind free, and another not free, on whatever tacks the vessels are, the one that has the wind free ought to give way, and the vessel with the wind not free ought to keep her course. But when you laid down such a rule as that, it had reference to different circumstances from those now before us. When two vessels are approaching each other—I do not care on which tack they may be—the one that has the wind free ought to give way, and the other ought not to alter her course to avoid danger on either side. That was the case that occurred the other day.¹ Nothing, I repeat, would be more mischievous than for a vessel, which ought to keep her course, to suppose that the other vessel would not do her duty, and therefore alter her course. This would lead to all sorts of mischief. But the question in the present case is, whether, when two vessels are meeting at night, and it is impossible to ascertain whether the other vessel is close-hauled or not, the vessel on the larboard tack, close-hauled, ought not to port her helm, as well as the vessel on the starboard tack: being dark, the *Trinity*

Rules do not apply, inasmuch as it would be impossible so [* 371] distinctly to make out a vessel's course as * could be done in broad daylight. That is a difficult question for decision.

Now the facts are, *The George*, in ballast, discovered *The Globe*, a laden vessel, in the first instance, and she immediately hoisted a light, after which she went on to do various acts with which you are best acquainted. The question I have to put to you is this: are you of opinion that *The Globe* was to blame, or that *The George* was to blame? I have said nothing about the weather, because it appears to me that it is not necessary to discuss either that question or the precise mode of contact.

¹ *The Test*, ante, p. 276.

CAPT. HAYMAN. My brother and myself are decidedly of opinion that The Globe was wrong. The Globe, seeing the vessel ahead, or nearly so, even if she had only two points of the wind free, ought to have put her helm a-port. The master of The George acted right. He kept a vigilant and good look-out, and directly he observed The Globe ahead, he squared his yards and kept away before the wind.

PER CURIAM. I dismiss this action with costs.

THE STADACONA.

Cause, by Act on Petition.

May 6, 1847.

Collision. A vessel, bound by the rules of navigation to port her helm, not doing so in sufficient time, held responsible for the damage caused by the consequent collision.

IN this case, likewise a case of collision, The Isabella, laden with lead and cork, from Portugal, bound to London, was coming up the Channel, when, about two o'clock in the morning of 31st March, nine leagues S. W. of the Lizard, she came in collision with The Stadacona, an Austrian vessel, in ballast, coming down channel, bound from London to Limerick. According to The Isabella, the wind was S. S. E., her course E., and she was on the starboard tack, one point free, going two knots an hour. On the part of The Stadacona, the wind was represented to have been S. S. W.; and she was stated to have been close-hauled on the larboard tack.

The Court was assisted by the same Trinity Masters.

Haggard and Jenner, Drs., for The Isabella; Addams and Bayford, Drs., for the Austrian vessel.

DR. LUSHINGTON (addressing the Trinity Masters.) [372]
Gentlemen: It appears to me that, though reference has been made, in the course of the argument, to the case decided this morning, there is not the slightest resemblance between the two cases in any respect whatever. In the former case, all the material facts were agreed to, and the question was, what was the proper

course which ought to have been pursued, according to the rules of good seamanship? In the present case, one of the most material facts — the quarter from which the wind blew — is directly in contest, and the evidence is contradictory, there being affidavits on both sides. You will have to make up your minds, first, as to whether it is necessary to decide from what quarter the wind did blow; and, secondly, what was done by both vessels. Let me briefly state the facts.

According to The Isabella, she was laden with lead and cork, coming up the Channel, on the starboard tack, the wind being S. S. E., and the course E., going two knots an hour, with the wind one point free. The Stadacona was coming down, on the larboard tack, and The Isabella, as soon as she discovered her, showed a light a-head: she did nothing else, but kept her course, according to her statement, and was struck on the starboard bow. The first point for your consideration will be — supposing the circumstances true — whether she was right in keeping her course. She certainly did right in showing a light.

On the part of The Stadacona, the first and most important difference between the two statements is as to the wind. On the part of The Stadacona it is stated to have blown from the S. S. W.; on the part of The Isabella from the S. S. E., being a difference of several points. The Stadacona states that she was an empty ship, proceeding to Limerick to take emigrants on board — that she was close-hauled, on the larboard tack. I looked to see what course she was steering, and I do not find that there is any direct averment. Whether it is important or not we will hereafter decide. This is the statement generally: that at midnight, on the 30th, the wind blew strong from the S., varying from S. to S. S. W., whereupon [*373] the vessel was *steered a course to the W. under topsails, courses, and topgallant sails; that, the night being hazy, a careful watch was kept on deck; that, shortly after one o'clock on the 31st, the ship's jib was set, at which time no vessel whatever was in sight. At half-past one o'clock, The Stadacona, being about nine leagues to the S. and W. of the Lizard, was still steering in the same course as on the preceding night, hauled by the wind on the larboard tack: it must have been so, but there is no precise statement in words of the course she was steering. According to her statement, she observed The Isabella one point on the larboard bow. She then ported her helm, and called to The Isabella to do so, but she kept closer to the wind, and the collision took place.

If it were indispensable to decide from which quarter the wind blew, we must consider how the evidence stands. There is a protest

made on behalf of The Isabella, which states that the wind was S. S. E., and two affidavits, together with one from Lieut. Paynter. It was urged by counsel, as an objection to his evidence, that he was distant about forty or fifty miles from the place of collision. In considering that objection, you will take into account whether the fact accords with the statement of The Isabella. From the two statements together you will form your opinion whether the evidence given by Lieut. Paynter will have a material bearing on the case. With respect to the evidence on the other side, there is the affidavit of the master and mate of The Stadacona, and there is also other evidence, to which I wish particularly to direct your attention — that of four volunteers. This is an Austrian vessel, and three of those who make affidavits are also Austrians, and one a Norwegian. They state that the wind was as represented by The Stadacona. You will consider what is the credit due to these statements; but I beg leave to add that your attention undoubtedly should be drawn to the log produced from on board The Isabella. It would have been no evidence in the case if produced on behalf of The Isabella, but having been produced on behalf of The Stadacona, it is then evidence which The Isabella may refer to, if necessary. * One [* 374] part of the statement I will read: "Strong winds and hazy; many vessels in sight. At 3 P. M. tacked ship to southward. At 4 P. M. double-reefed the mainsail and topsails, and reefed the trysail and foresail; Lizard Point bore E. N. E., distant five miles. Mid-night, moderate breeze and clear weather; tacked ship to eastward." Before that, the ship, I presume, had her head to the W., and, I presume, that she should have had her head to the E. as she was going up Channel, on a wind which was S. S. E., and she would not have had her head to the W. if she could have avoided it. "At 1 A. M. saw a ship ahead; immediately showed the light, and found she did not answer it, and, seeing her nearing of us fast, hailed the ship, and she answered us. We did our best endeavors to avoid her, but to no purpose." Then the accident takes place. You will consider whether any light is thrown on the difficulty of the case by having before you the manœuvres pursued by this vessel antecedently — whether you will get any clue as to what was the real state of the wind at this time.

It has been said that The Stadacona ought to have ported, and she did port her helm. That is true enough, but did she port it in time? which is a different question. No doubt she ported it when she saw the collision approaching; but if you adopt a measure at an improper time, it does not take away the culpability of not having done it before, and preventing the accident. I ask you, whether you are of opinion that The Isabella was to blame in this case?

The John Buddle. 5 Notes of Cases.

CAPT. HAYMAN. We think that the wind was S. S. E. The *Isabella* did all she could, under the circumstances. She was close-hauled on the wind and the master never altered his course. The other ship was coming free. Though she put the helm up, did she do it in time? We say no; therefore she is to blame.

PER CURIAM. I pronounce for the damage and costs.

[* 387]

THE JOHN BUDDLE.

Cause, by Plea and Proof.

June 3, 1847.

Collision. Where two vessels were closely approaching each other, on a dark night, and the vessel on the larboard tack was unmanageable, and could not, therefore, give way, and the vessel on the starboard tack did not perceive her unmanageable state, and kept her course:

Held, that their collision was purely accidental. What is the duty of a vessel in an unmanageable condition, under such circumstances.

THIS was a cause of damage by collision, brought (in the first instance) by the owners of the schooner *Eliza Ann* against the brig *John Buddle*, the owners of which brought a cross-action against the schooner. The latter, a vessel of 122 tons, with six hands, coal-laden, was proceeding from Seaham to the south; the brig, of 260 tons, in ballast, having eight hands, was bound to the north. The schooner was close-hauled on the starboard tack, lying S. S. E., the wind being S. W. (according to her statement, but according to *The John Buddle* W. S. W.) when, about ten o'clock at night, on the 19th November, 1846, off Flamborough Head, she came in collision with the brig, which was on the larboard tack. The night was dark, and the vessels were in proximity before they descried each other. The schooner kept her course. On the part of the brig, whose duty it was, according to rule, to have given way, by porting her helm, the defence was that, at the time of the collision, she was unmanageable, being then, and having been for twenty minutes before, up in the wind, with her courses shaking, to enable her crew to reef the sails, and, as she could not get out of the schooner's way, if either vessel was to blame, it was *The Eliza Ann*, who should have got out of the brig's way, and might have done so if she had kept a good look-out.

The Court was assisted by Trinity Masters.¹

Addams and Bayford, Drs., for The Eliza Ann; Haggard and Twiss, Drs., for The John Buddle.

DR. LUSHINGTON (addressing the Trinity Masters.) Gentlemen : It appears to me that this case is one of a very simple character,* and that its decision depends upon two or three [* 388] questions of fact. Let us, in the first instance, take those matters respecting which there is no controversy; then let us consider what would be your rule; and, lastly, see what are the circumstances, and whether they form an exception to that rule or not.

The wind appears to have been blowing strong, though not a gale: I think it must be taken to be a strong wind, from the very fact of the vessel reefing her sails. The night was rather dark, but not very dark. The quarter from which the wind blew, perhaps, may not be of much importance, but in the original averment on behalf of The Eliza Ann, it is stated to have been S. W., and in the defence, on behalf of The John Buddle, W. S. W., two points more to the N. I apprehend that it is of little importance whether the wind was a little more or less free. The Eliza Ann was close-hauled on the starboard tack, proceeding to the south; The John Buddle on the larboard tack, proceeding to the north, and, according to your ordinary rules, The Eliza Ann ought to have kept her course, and not given way. But all rules are framed for the benefit of ships navigating the seas, and, no doubt, circumstances will arise in which it would be perfect folly to attempt to carry into execution every rule, however wisely framed. It is, at the same time, of the greatest possible importance to adhere as closely as possible to established rules, and never to allow a deviation from them unless the circumstances, which are alleged to have rendered such deviation necessary, are most distinctly proved and established; otherwise vessels would always be in doubt and doing wrong. Just prior to the collision, it appears, The John Buddle was occupied in reefing her sails, and it is admitted on her behalf that she called on The Eliza Ann to put her helm down; that she put her own helm down, and did not attempt to give way, as it would have been her duty to have done, if she had not been reefing her sails. Now, the burden of proof lies on The John Buddle, and she must show why, under existing circumstances,

¹ Captain Rees and Captain Gordon.

the ordinary course was not pursued. Her answer is this: [* 389] that she was not in a manageable * state at the time when the two vessels were closely approaching each other. Now, you have heard a great deal of discussion about what is a manageable and what an unmanageable state. You will consider whether she was so unmanageable that she could not pursue the ordinary rule of giving way. That is not a question which I am competent to decide; it is a point entirely for you to determine, because it is simply a question of nautical skill and knowledge. But it was very ingeniously argued, that she was not in an unmanageable state when the two vessels were in proximity to each other, but that she became so by the order given to the man at the helm to put the helm down, and it is said that rendered her unmanageable. That is a matter for your consideration; but, in point of law, I think it my duty to state my opinion. If The John Buddle was so unmanageable that it was quite impossible to take the course directed by the rule, it was her duty to do the best she could to avoid the collision, and if she could not avoid it, then she must do that which is the next best, namely, render it as light as possible. It is not a question of putting the helm one way or the other; she must do the best the circumstances allow, always presuming that she kept a good look-out; because, if the accident arose from her own negligence in not keeping a good look-out, her defence fails, and she ought to be responsible. You will consider whether there was a proper look-out kept on board. So much for The John Buddle: if she was unmanageable, she was right in taking the best measures she could adopt to avoid the collision.

With regard to The Eliza Ann, the question is this: assuming The John Buddle to have been unmanageable, ought she, having kept a good look-out, to have seen her in time to have avoided the collision? Because, if The Eliza Ann saw The John Buddle unmanageable, with her head in the wind, the rule of the Trinity House cannot be said to apply to such a case. It might just as well be said that, if she had seen a vessel at anchor, she was to keep her course, and run her down. Therefore, you will have to consider, looking at all [* 390] the circumstances of the case, * whether those on board The Eliza Ann might have discovered the unmanageable condition of The John Buddle in time to have pursued measures to avoid her. The law is this. If both vessels are to blame, the damage must be shared between them; if one vessel only is to blame, then that vessel must pay the damage. But if, as may be the case here, these vessels accidentally came into close proximity, and the collision was purely accidental, — that is, the night not being very dark when the two vessels were approaching each other, if The Eliza Ann could

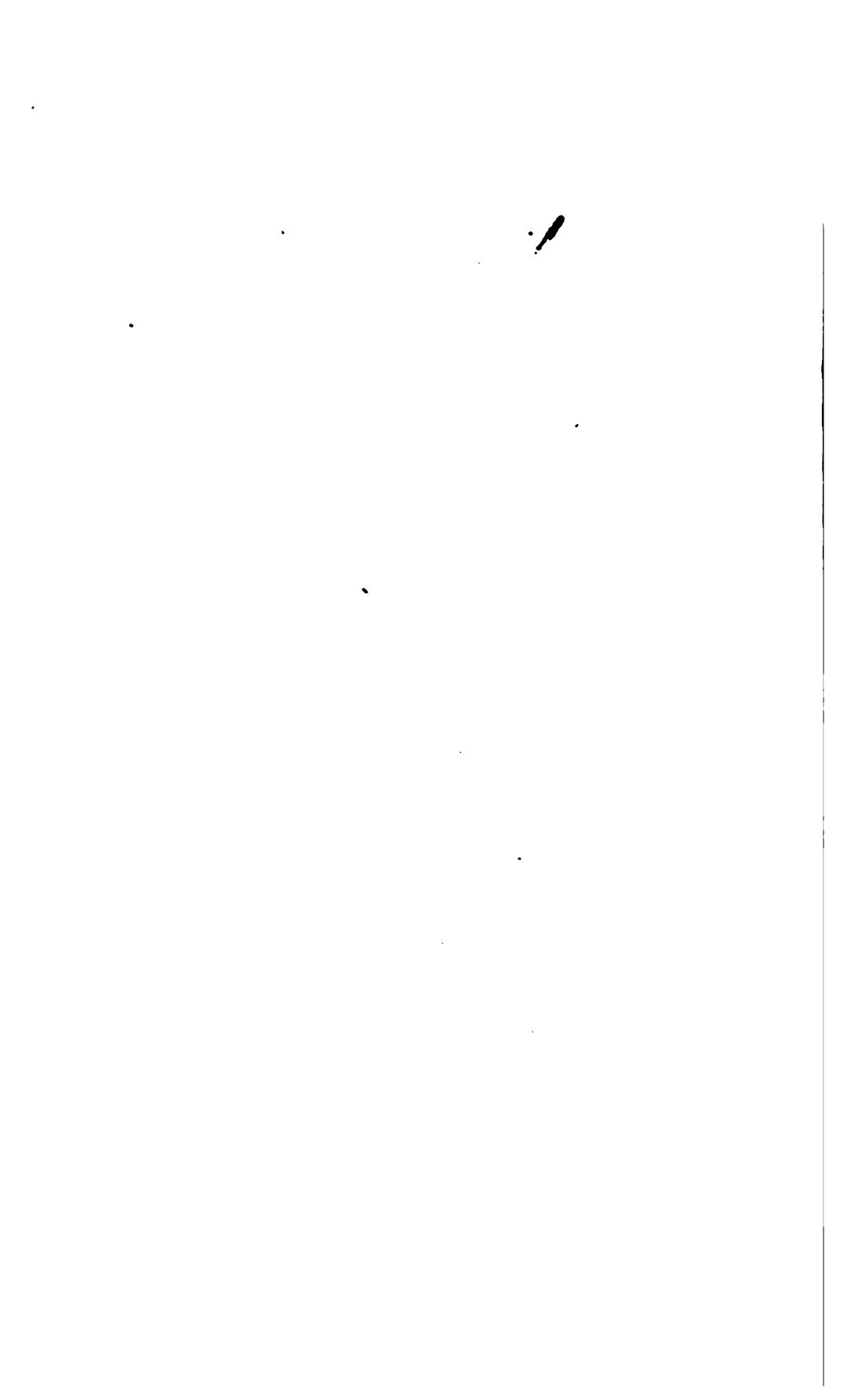
The John Buddle. 5 Notes of Cases.

not see, with a reasonable degree of care and caution, that The John Buddle had her head in the wind, and was unmanageable, and if The John Buddle could adopt no other measures than those she pursued, the collision was purely accidental, and each party must bear his loss.

You will have the kindness to tell me whether you think that this was a case of pure accident, or whether any blame attaches to either vessel.

CAPT. REES. We think it was a pure accident.

PER CURIAM. This being the case, I must dismiss both actions, without costs. I should add, that my opinion entirely coincides with that of these gentlemen.



8

CASES

SELECTED FROM VOLUME VI.

OF

NOTES OF CASES.

[THE CASES SELECTED ARE THOSE NOT REPORTED IN THE REGULAR REPORTS.]

1848-1849.

NOTES OF CASES.

VOLUME VI.

* THE LONDON.

[* 29]

Cause, by Act on Petition.

January 28, 1848.

Collision. When two vessels are in danger of collision, in broad daylight, one of them lying to, dead, with her head to windward, if the other, in order to avoid a collision, should there be a possibility of avoiding it, does more than she is bound to do, the court will view that with great approbation.

THIS was a cause of damage by collision between two small schooners, *The London*, of 70 tons, bound from the port of London to Peterhead, with a cargo, and *The Lavinia*, of 64 tons, in ballast, from Dieppe to Blakeney, in Norfolk. The collision occurred on the 1st September, between Cromer and the Sherringham Buoy. Both vessels sustained damage, and cross-actions were brought by the owners of each vessel against the other; but it was agreed that the present action, by the owners of *The Lavinia* against *The London*, by determining which party was to blame, should decide both. The court was assisted by Trinity Masters.¹

Jenner and *Harding*, Drs., for *The Lavinia*; *Phillimore*, Adm. A., and *Robertson*, Dr., for *The London*.

¹ Captain Weller and Captain Pixley.

DR. LUSHINGTON (addressing the Trinity Masters.) Gentlemen: It appears that The Lavinia was a vessel in ballast, proceeding from Dieppe to Blakeney, and on the 1st September, about half-past 3 P. M., she was some short distance beyond Cromer, it being broad daylight. According to her statement, the wind was W.; she was on the starboard tack, and her course was S. S. W.; she was under all sail, except the foresail, and she descried The London on the larboard tack, reaching to the northward. The London was hailed to port her helm; but she came on, and struck The Lavinia in the way of the mainchains upon the larboard side, with her stem, and did the damage mentioned.

Assuming all these facts to be true, I apprehend there could not exist any doubt whatever that The London is bound to pay for the damage, because she was on the larboard tack, and The Lavinia on the starboard, and therefore the former was bound to give way to the latter.

[* 30] * But we must look at the answer of The London. In the first place, it is said, the wind was W. N. W., and not W.; but I do not know that that is important. The second point is of more importance, namely, that The London was lying-to, dead, with her head to windward. Thirdly, that all the crew, except the master, were aloft, reefing the topsails. Fourthly, that The Lavinia was going to the southward and eastward, and not to the S. S. W. That is a direct contradiction. Fifthly, that the helm of The London was ported, notwithstanding she was lying-to, dead, with her head to windward, but that she would not answer her helm. Sixthly, that The Lavinia ran into the bows of The London. Seventhly, that The Lavinia might and ought to have avoided the collision. So the case stood originally; but in the rejoinder it is alleged that The Lavinia came across the hawse of The London, was caught by her jibboom, got entangled in her rigging, and was canted round, and forced into The London. Now I confess, from the beginning, I had considerable difficulty in satisfying my mind that there is not some contradiction between these two averments—in the original defence and in the rejoinder. However, you must judge whether there is a contradiction, and whether the contradiction is of importance. Perhaps it may only arise from the very confused manner in which it is stated, and, no doubt, nothing can be more confused than the statement, there being an utter disregard of antecedents and relatives from beginning to end. It would have been far better to have had it in plain, common language. But there is one fact, which is certainly of importance, that is, whether you are of opinion that The Lavinia ran into the bows of The London, or whether the damage

arose in consequence of The London having struck The Lavinia in the way of the mainchains, on her larboard side, with her stem. I have no hesitation in telling you that the preponderance of the evidence, in my view, is in favor of the Lavinia, because there is no reason to doubt the affidavits made by Lloyd's surveyor, and by the engineer and shipwright. I have no doubt of the statement being correct. This being so, you will have the goodness to tell me whether you are of opinion that this collision arose *from [*31] the fault of The London, or whether she was in a state utterly incapable of assisting herself, so that it became the absolute duty of The Lavinia to avoid her. If you are of opinion that she was incapable of helping herself, and that The Lavinia might and ought to have avoided the collision, then, of course, you will pronounce against the damage in this case, and it will follow that you pronounce for the damage in the other.

CAPT. WELLER. We are of opinion that The Lavinia acted as she ought to have done, according to the usages of seamanship; and that The London did not do what she might have done. She ported her helm, but that is all. If she had taken proper measures, there would have been no collision.

DR. LUSHINGTON. Then The London is to blame. I pronounce, in the first case, against The London, and condemn her in the damages and costs; and I dismiss the other action.

There is another observation which I must make, although it is not a point that can be raised in this case. It is this: when two vessels are in this situation, in broad daylight, though The Lavinia did right in the course she pursued, yet, in order to avoid a collision, a vessel ought not obstinately to persist in doing right, if there is a possibility of escape; and the Court will deem it necessary, in future cases, to take into consideration the particular circumstances of the case; and if, for the purpose of avoiding a collision, should there be a possibility of avoiding it, a vessel should do more than she is bound to do, the Court will view that with great approbation.

[* 36]

* THE STRANGER.

Cause, by Act on Petition.

February 8, 1848.

Collision. Rule of navigation, where two sailing vessels meet at night, being on different tacks.

THIS was a cause of damage by the owners of the brig St. Petersburg Packet, against a schooner called The Stranger, which came in collision with her about midnight of the 17th September, 1847, between Flamborough Head and the Humber. The brig, coal-laden, bound from Stockton to Yarmouth, was steering to the S.; the schooner, in ballast, was proceeding to the N., and was sailing N. N. W. On the part of the brig it was alleged that the wind was W. to W. by S., or S. W., and that she was close-hauled on the starboard tack. On behalf of the schooner, the wind was stated to be W. N. W., and it was alleged that she was close-hauled on the larboard tack, whereas the brig had the wind free. The brig first discovered the schooner about a point or a point and a-half on her lee bow, and was soon afterwards struck by the schooner on the larboard bow, and sank in a few minutes, the crew being picked up by the schooner and taken to Boston, whence they were sent to Yarmouth by the Shipwrecked Mariners' Society. On the part of the

[* 37] schooner * it was stated that the brig was seen when about 150 yards distant, coming down on the schooner's lee bow, steering E. S. E., and she suddenly put her helm down, and ran across the hawse of the schooner, though hailed to put her helm hard a-starboard.

The Court was assisted by Trinity Masters.¹

Haggard and Jenner, Drs., for the brig; *Bayford and Twiss, Drs.*, for the schooner.

DR. LUSHINGTON (addressing the Trinity Masters.) Gentlemen: The vessel proceeding, The St. Petersburg Packet, bound from Stockton to Yarmouth, laden with coals, had rounded Flamborough Head,

¹ Captain Hayman and Captain Gordon.

being on the starboard tack; the vessel proceeded against, a schooner of 83 tons, was in ballast, proceeding to the N., and was on the larboard tack. According to the general rule, it was the duty of the schooner to give way; but it is alleged that the wind was free for The St. Petersburg Packet, and contrary for the schooner. The wind, on behalf of the brig, is said to have been W. and by S., and on behalf of the schooner W. N. W. You will take into consideration all you have heard on the subject, and the evidence, and you will have to determine whether, in your opinion, the wind did blow from such a quarter as to relax, or take away, the general rule as to a vessel on the larboard tack giving way to one on the starboard. If you are of opinion that the schooner was altogether close-hauled, and the brig had the wind perfectly free, then another view of the question may be taken; but it is for you to determine that point. I confess I had some difficulty in ascertaining, from the representations on the part of the schooner, what was the manner in which the collision actually took place. The statement on her behalf is, that, "on perceiving the brig, the master hailed the man at the helm to know whether he saw the brig, to which he replied 'Yes, she is running to leeward;' that the brig continued her course of E. S. E. until she had got on The Stranger's lee bow, and the weather side of her courses became *clearly visible, the brig being at such [* 38] time from 100 to 150 yards distant; that she then suddenly altered her course, by putting her helm down, and came to the wind; that the master, on seeing the brig so alter her course, immediately hailed her crew, and which he continued to do several times, to put her helm hard a-starboard, or they would be foul of his vessel; but no notice was taken of the hailing; and the master then, seeing a collision to be inevitable, ordered the schooner's helm to be put in the lee becket, which was immediately done, in order to ease the blow; that whilst the schooner was coming to the wind, and her sails were shaking, the brig shot across her hawse, striking her with her larboard bow." Now I cannot understand in what direction it is intended to represent that the brig was sailing, or the course she was following, at that period; nor do I collect from this in what part of the vessel the striking took place with the larboard bow of the brig. Another fact, much relied upon in this case, is, that, previous to the accident, the brig had given way to another vessel to the windward. Whether you think that, because she had given way to one vessel to the windward, she ought to give way to another vessel to windward, is a circumstance I also leave to you. You will have the kindness to state which of the vessels was to blame for the collision, for undoubtedly blame is attributable to one or the other.

CAPT. HAYMAN. We are decidedly of opinion that The St. Petersburg Packet acted quite right. She was on the starboard tack, and nearly close to the wind, and there is no doubt in our minds that the captain and crew of that vessel did every thing required of them. We consider that, whether the wind was W. by S., or S. W., or W. N. W., it cannot make any difference in this case. It would be a very dangerous thing to open the old law for night navigation on the English coast, where so many hundreds of vessels are constantly passing, that the vessel on the starboard tack is not to bear up, but the vessel on the larboard tack is to give way, as it would cause the loss of many ships and much property. There is no doubt that the schooner's duty, seeing a vessel approaching at that rapid [* 39] rate, was to have put * her helm hard a-port, hauled down the foresail, eased the mainsheet, and lowered the peak; and, not having done so, we think the whole blame is attributable to her.

PER CURIAM. I pronounce for the damage, with costs.

THE PRINCE OF WALES.

Cause, by Act on Petition.

February 8, 1848.

Salvage. The supplying of a cable and chain by the crew of a lugger to a vessel which had slipped her anchor, but was not otherwise disabled, in boisterous weather, and in the neighborhood of dangers, held to be a salvage service. The nature of such an act differs according to the circumstances under which it is performed. A pilot on board the vessel salvaged is not to refuse to make an affidavit for the salvors.

THIS was a suit by the master, owner, and crew of the lugger Phoebe, for a remuneration for a salvage service rendered to the bark Prince of Wales, bound from St. John's, New Brunswick, to London, with a cargo of timber, which arrived in the Downs on the 5th December, 1847. On the next day, the weather being boisterous, the anchor came home, and she was obliged to slip, and was driven through the Gull Stream. The salvors, who were on the look-out to assist vessels in distress, offered their services, which were accepted, and putting a man on board the bark, the rest proceeded in the lugger, by desire of the master, to Ramsgate, for a chain and

cable, which, with the aid of another lugger, were put on board the bark. The value of the ship, cargo, and freight, was 5,180*l.*; a tender of 85*l.* was made and rejected.

Sir J. Dodson, Q. A., and Bayford, Dr., were for the salvors; *Adams and Twiss, Drs.,* for the owners, who maintained that the sum tendered was ample for merely fetching an anchor and cable, and that this suit was an attempt at extortion.

DR. LUSHINGTON. It appears to me that the carrying out an anchor and cable is a service of a very different nature according to the circumstances under which it is performed; in proportion to the difficulty and danger which may attend such a service, and the weight of the anchor itself: therefore, I do not think that any deduction can be drawn from the mere fact of carrying out an anchor and
*cable, without taking into consideration all the other cir- [*40]
cumstances attending the act.

I will first look at the protest on behalf of the owners of this vessel; because I think it important to see what is their representation of the state and condition of the vessel, both before the service was performed and afterwards. Having stated that, on the 5th of December, they had taken on board a Cinque Ports pilot, when off Dungeness, to convey the vessel to the Downs, they then state, they proceeded, and "on the 6th, at 6.30, the wind increased, and blew a gale from the S. S. W." This is a stormy season of the year, and it appears (to adopt the expression used in this protest) that "a gale" had preceded this service; and it is well known what is the meaning of seamen when they use that word. "At 8.30, the gale increasing, the appearer was obliged to veer away the cable to 60 fathoms. At 9 A. M., finding that the vessel was riding very heavily, the cable was veered away to 75 fathoms. At 10.30 A. M., in consequence of the heavy pitching of the vessel, the anchor came home, and the ship began to drive; and, in order to prevent her driving upon the Goodwin Sands, the appearer, by the advice of the pilot, slipped the chain cable, having previously put a slip-buoy upon it." Then, at this time, there is the loss of the anchor and cable, and I think a very important loss too; because, though I am told that taking the anchor and cable on board was merely a measure of precaution, yet it appears to me to have been a measure of precaution which every man of common sense would adopt at that season of the year, and especially looking at the state of the weather at that time. It is a measure so absolutely necessary, that no man of common sense would have attempted to prosecute the voyage, under the circum-

stances, without adopting such a measure of precaution. The loss of the anchor and cable being a matter of necessity, the ship was then "run through the Gull stream, under close-reefed fore-topsail and main spencer, the wind blowing a strong gale at S. W. by W., the violence of which split the main-topsail whilst taking in the close reef.

At 1 P. M. the vessel was brought to an anchor in eight [*41] fathoms of water, with the best *bower anchor and 100 fathoms of chain cable, the North Foreland bearing S. by E., and Margate Church S. W. by S."

This having taken place, I look to see what was done on behalf of the salvors. According to their statement, early in the morning, the weather having been exceedingly tempestuous, they proceeded in their vessel for the purpose of rendering assistance to any vessel which might require it. Their vessel seems to have been of seventeen tons, and the whole of the salvors I may take at seven or eight persons. They came up with this vessel, and it is objected by Dr. Addams that there was no necessity to have boarded her; that they might at once have proceeded to Margate, to order the anchor and cable which were wanted. But it does not appear to me that that case is set up in the proceedings on behalf of the owners; nor do I think it could fairly have been set up, for this reason: there was an anchor of twenty-seven cwt., with a cable, to be procured; that is not a matter so easy to be accomplished, unless the salvors were provided with sufficient orders and directions for the purchase of such articles, and more especially when I see it is admitted that the man, when he comes on board, has a conversation with the master below. I cannot say that this was unnecessary or improper, or that any blame could attach to the salvors, in consequence of one of them having boarded the vessel. It appears, from a letter written by the master, that *The Phoebe*, with the salvors, went to Margate for the anchor and cable, one remaining on board the vessel. Why one remained on board the vessel has been the subject of some discussion at the bar and in the proceedings. It is expressly alleged in the original act on petition, that he remained there at the request and desire of the pilot; and I find in the answer to the act that this is denied, and it is stated that he only remained there because it was customary for one of the salvors to remain, as it were, to keep possession, and because the rolling of the sea might have rendered it inconvenient to leave. Now I should have expected that Richard Mowle, the pilot, would say something on that point, because he is represented as having used the [*42] *expression. Let us see if he has denied the expression so imputed to him. He says, in his affidavit, which is not a very long one, and which omits very many important circumstances

attending this case, that he was in charge of the vessel, and then he goes on—without saying a word beyond this—"The bark was boarded, off Broadstairs, by one of the crew of the lugger *Phœbe*, shortly after which, the lugger was despatched to Margate, to bring off an anchor and chain, in the place of one from which the bark had shortly before slipped, and upon which occasion of sending ashore for another one, the man who had boarded the bark, instead of joining his shipmates, remained on board, to suit his own convenience, it being the invariable practice for boatmen to leave a man on board, under such circumstances, to keep other boats off, and to prevent their interfering with the first boat and crew employed." Why did he not swear that no such conversation took place? which, in the answer to the act on petition, is denied in direct terms, in these words: "Clarkson denied that the said boatman remained on board the bark at the request of Richard Mowle, a duly licensed Cinque Ports pilot, as untruly alleged." I presume that the answer to the act on petition, or some part of it, was read over to Mowle by the agent on the spot, and if he could have sworn to it he would. But I make the observation for another reason. There is an affidavit produced, and the only legal purpose for which I can use it, or for which it ought to be used, is to show that, in the original act on petition, there was a statement which could and ought to be either supported or negatived by Mowle the pilot, namely, that an application had been made to him for an affidavit for the salvors, and he refused to make one for the salvors; and here I find he comes and makes an affidavit on the part of the owners, leaving out the most important parts of the case. When I first read the case, and before I looked to Mowle's affidavit, it occurred to me, if this person had made no affidavit, what ought to be the course the Court should take in order to enforce the ends of justice? If he had made no affidavit, I would have had recourse to the provisions of the 3 and *4 Vict., c. 65, sec. 7, and compelled him to be examined. [*43] I will do so in future; because for a man to withhold from the Court evidence which is necessary to the cause, is a course which the Court will always reprehend; and in the case of a pilot, if I find it repeated, I will take care to report the fact to the Commissioners of Pilotage, and that man shall be no longer a pilot. It is evident that justice in this Court would be defeated by such conduct; and if, in any future case, I find there is reason to think that evidence has been kept back, I will take care that, if it be done by a pilot, that man shall be punished.

The *Phœbe* goes back to obtain the anchor, which is of considerable dimensions, and a cable of considerable length, weighing alto-

gether nearly eight tons, and much difficulty and danger attended this. It was very truly observed by Dr. Addams, that it is one thing to bring the anchor and cable off from the shore at Deal, and another to fetch them from Margate; but still, considering the state of the wind and the weather, it was not an easy matter to get an anchor and cable on board this vessel. The harbor-master, a man of the greatest experience, and who is himself a Commissioner of Salvage, says that he was apprehensive for the safety of the lugger from the great weight of the anchor and chain, from the weather, and from its becoming dark. I consider this affidavit to be entitled to considerable weight, especially as I find nothing to negative it, or only an argumentative negative. And again; it is sworn by Campay and Harman, that they received 92*l.* from another vessel for an anchor and cable.

There is another point in this case, namely, whether I ought to consider the danger which might have subsequently ensued in consequence of its coming on to blow a heavy gale. What, in such an event, were the men with the anchor and cable to do? How does the pilot swear as to this point? So as to give the Court information? No, but to deceive it. He swears, "that the men who brought off the anchor and chain did not run more than the ordinary risk," — no man being able to say what the risk was at that season of the year. "The wind at that time had moderated;"

[*44] *that is in opposition to the protest. "At no period whatever was the bark in any danger of drifting ashore on any sand whatsoever, as she was always well under command." How can this man venture to swear that this vessel would have been in no danger if an anchor and cable had not been put on board, when we see what happened to two other vessels?

It appears from the act on petition, that an offer was made to refer this case to the Commissioners upon the spot, and I do not find this contradicted. They would have been competent to form an opinion upon it, because they have local knowledge and experience, which the Court cannot pretend to possess. I do not say that the parties have not a right to resort to this Court if they think fit, but at the same time they must not complain if the expenses are greater than before the local Commissioners. Taking the whole case into consideration, I am of opinion that 85*l.* is not sufficient, and I shall allot 130*l.*

*THE GEORGE.

[* 53]

Appeal — Cause.

February 28, 1848.

Collision. A vessel (A) sailing on the starboard tack, with the wind three points free, at night, descries, at a quarter of a mile, another vessel (B) close-hauled on the larboard tack, as alleged, so far to windward that, believing, if both vessels kept their courses, they would go clear, she did not give way (whereas (B) ported her helm,) and the vessels came in collision: —

Held, that (A) was in fault and (B) did right, the two vessels having approached each other stem on.

THIS was an appeal from the High Court of Admiralty in a cause of damage, by the owners, master, and crew of the schooner *Globe*, against the brig *George*. The schooner, of 103 tons, coal-laden, proceeding from Stockton-on-Tees to Topsham, Devon, on the 18th December, 1846, about half-past 6 o'clock, P. M., it being dark, Whitby Light bearing W., distant five miles, discerned, a quarter of a mile off, a light from a vessel approaching her. The schooner's course was S. E. and by S., the wind being W. S. W., three points free, and she was on the starboard tack. The other vessel, The *George*, of 191 tons, (bound from Shoreham to Hartlepool, in ballast,) was close-hauled on the larboard tack, steering N. W. and by N. The master of The *Globe*, considering that the brig was so far to windward of him that if both vessels kept their course they would go free, did not port his helm; but, discovering that the brig was coming before the wind close upon his weather beam, he put his helm hard a-weather, but before the schooner could wear a quarter of a point, The *George* came stem on, and struck The *Globe*, which was nearly cut in two, and * soon after sank. The [* 54] *George*, as soon as The *Globe* was seen, hoisted a light, put her helm a-port, and bore away.

The Judge of the Admiralty Court, assisted by two Trinity Masters, held¹ that The *Globe* was wrong, and The *George* acted rightly; and dismissed the action, with costs. From this judgment the owners and crew of The *Globe* appealed to her Majesty in council,

¹ 5 Notes of Cases, 368.

the final clause and prayer of the Petition of Appeal being as follows:—

“And your petitioner also humbly represents to your Majesty that the question at issue in the said cause is one purely nautical, and that the ordinary members of your Majesty’s said Court of Privy Council are not sufficiently conversant therewith, and that it is, therefore, essential to the ends of justice that they should be assisted by the opinion of two competent sailing-masters in your Majesty’s service, to whom the nautical points should be submitted for their advice thereon. Wherefore your petitioner most humbly prays that your Majesty will be pleased to refer this petition and the said appeal to the judicial committee of the privy council, and especially to direct that they shall be assisted at the hearing by two competent sailing-masters of your Majesty’s royal navy.”

The appellants sustained their case on the following grounds:— That a vessel on a wind being bound by one of the ordinary rules of navigation to keep her course, and The George, being on a wind, having altered her course without any necessity, and thereby brought on the collision, the distinction upon which the sentence was mainly founded, namely, that the rule of navigation in question is not equally applicable by night as by day, is one neither sound in itself, nor ever suggested in any other case; that The Globe, which had the wind free, and therefore, by another of the ordinary rules of navigation, was bound to keep clear of The George, was especially justified in this instance in seeking so to do by not altering her course (on the supposition that the other vessel would also, as it was her duty to do,

keep her course unaltered) by the facts pleaded and proved [* 55] on the part of The * Globe, namely, that The George when first seen from her was full two points on her starboard and weather bow, and that afterwards, and before she altered her course, the masts of The George were seen from The Globe apart, and well open to windward; under which circumstances, but for such subsequent alteration of her course by The George, contrary to the known rule of navigation, the two vessels (The Globe also keeping her course) would have passed each other a hundred fathoms apart; that the facts pleaded by The George as in vindication of, or by way of accounting for, her violation of the known rule of navigation, namely, that the vessels were approaching each other stem on, and that she altered her course and bore away before any alteration was made in the helm of the other vessel, are demonstrably false, inasmuch as in that case she must have opened her larboard broadside to The Globe, and gone far to leeward of her, and without the possibility of a collision, but which must, if possible, then have occurred

by The Globe running into the larboard side of The George, and not, as the admitted fact was, by The George running into the starboard side of The Globe, and thereby sinking her.

Addams, Dr., for the appellants, cited *The Traveller*,¹ and *The Test*.² *Sir John Dodson*, Q. A., and *Bayford*, Dr., for the respondents, cited *The Stranger*.³

JUDGMENT.

LORD CAMPBELL. There is no question of law in this case, but only a plain question of fact: were the two ships coming stem on? Now this question of fact was very particularly put by the learned judge in the court below to the Trinity Masters. He stated the question as one respecting which there was discordant evidence, "Whether the vessels were approaching stem on, or The George was considerably to the windward of the Globe?" and he asked them whether The Globe was to blame, or The George? What was the opinion of the Trinity Masters? "The Globe, seeing the vessel ahead, or nearly so, even if she had only two points of the *wind free, ought to have put her helm a-port;" that [* 56] The Globe was wrong and The George right. The learned judge concurred in that opinion. Now we are by no means bound by the decision of the Trinity Masters, and if there were satisfactory reasons for thinking that the learned judge ought not to have been guided by their opinion, we should have no hesitation in reversing his judgment. But instead of its appearing to us that the Trinity Masters were wrong, and that the learned judge ought not to have dismissed the action, we are of opinion that his sentence was perfectly right, and that, according to the evidence and to all the probabilities of the case, the two vessels were coming nearly stem on, and that the master of The George did right in "squaring his yards and keeping away before the wind."

Under these circumstances, we are of opinion that the sentence appealed from ought to be affirmed, with costs.⁴

¹ 2 Rob. jun. 197. 2 Notes of Cases, 476.

² 5 Notes of Cases, 276.

³ *Antea*, 36.

⁴ The committee consisted of Lord Langdale, (M. R.) Lord Campbell, Sir H. Jenner Fust, and Mr. Pemberton Leigh.

THE ENDEAVOUR.

Appeal — Cause.

February 28, 1848.

Salvage. Tender held to be sufficient. The getting up of the anchors of the vessel saved (after she had been rescued from the immediate peril on account of which the salvors were originally engaged) by another party, employed by the original salvors.

Held, not to be a service entitling those who rendered it to share in the general salvage of ship and cargo.

THIS was likewise an appeal from the High Court of Admiralty, in a cause of salvage, by the masters, owners, and crews of two yawls, *The Welcome Home* and *The Happy Return*, against the snow *Endeavour*, for services rendered to her on the 29th January, 1846. On the afternoon of that day, the snow, on a voyage from Hartlepool to London, with a cargo of coals, was run into and damaged in her rigging by a brig, in *Corton Roads*, and soon after, missing stays, she grounded on the north part of the *Newcombe Sand*, about 4, P. M., an hour after low water. The weather was fine; the wind very light. All sail was hove a-back, but without effect, and the small bower anchor (9 cwt.) was let go, and twenty-five fathoms of chain veered away. About five, a fishing-smack came alongside, and offered assistance, which the master declined.

[* 57] *The Welcome Home*, with eighteen men, and a galley, afterwards came alongside, and the master of the snow inquired the charge for running an anchor away. The yawl's crew refused to make any specific charge, and the master engaged their services. The salvors ran away the snow's best bower anchor (10 cwt.) and fifty fathoms of chain, and her small bower being slipped, she was, at high water, (about half-past nine, P. M.,) hove off to the best bower; her kedge, with two warps, was run away to the eastward, and she was hove further off the ground, slipped from her best bower and chain, and brought up by her kedge until the salvors recovered the snow's anchors and cables, and at about half-past ten she was brought up in *Corton Roads*. In recovering the anchors and chains, the other yawl, *The Happy Return*, with eighteen men, was employed; the whole number of salvors engaged in the actual salvage service was twenty-nine. The salvors laid stress upon the number employed, alleging that it was owing to that circumstance alone that the vessel was got off that tide; whereas the owners of the snow contended that such numerical force was wholly unnecessary, and

altogether unauthorized by the master, who only engaged the crew of The Welcome Home to carry out an anchor and heave at the windlass; that this yawl's crew could have recovered both anchors and chains, as they were engaged to do, and they argued that, if an unlimited number of persons are permitted by the original salvors to assist in doing that for which the latter were solely engaged, and quite competent to perform, the owners are not legally rendered liable to remunerate such persons as salvors.

The value of the ship, cargo, and freight, was sworn at £1,834. The owners tendered 100*l.*, which the salvors rejected, and the action was entered at 400*l.*

The sentence in the court below was as follows: —

DR. LUSHINGTON. The circumstances of this case appear to me to lie in a very narrow compass indeed. This vessel, coal-laden, from Hartlepool, was, on the 29th of January, run into by some other ship, and about four o'clock in the afternoon she got on the north part of the Newcombe Sand. At this time, a vessel, named The Retrospect, with two hands, came up; but the master, being confident in the strength of * his own resources, refused [* 58] to receive their aid for the purpose of rescuing himself from the danger in which he was undoubtedly in some degree placed. While the vessel was on the sand he let go the small bower anchor; but, about six o'clock, thinking it would be most advantageous for the interests of his owners, he engaged the services of two smacks, with twenty-nine hands. These men immediately applied themselves to getting out a kedge and the best bower anchor; they slipped from the small bower, carried out another kedge, and finally slipped from the best bower anchor, by means of which the vessel got off the sand.

It appears to me, I confess, that this was an end to the salvage service, and that that service was in fact performed by the twenty-nine hands to whom I have now adverted. Subsequently, it appears that The Happy Return, with no less than eighteen hands, was engaged not to save the ship and cargo, but to get up the bower anchors. About twelve o'clock at night, at the very latest, part of the salvors rowed the master to Yarmouth, and returned about four o'clock in the morning. I entertain exceedingly great doubts as to whether there was any necessity for the employment of The Happy Return; but of this I have no doubt, that she was not a salvor in any legal sense of the term. If she is entitled to be paid at all it is simply for the work and labor done in getting up the anchors.

These people remain on board till about six, A. M., for what purpose I do not know, at least so far as the vessel required assistance. There is no purpose alleged; all that they state is, that, after having rowed to Yarmouth and back, the master having determined to proceed to London, they returned. In truth and in fact, the whole service was finished at the time she was got off the sand. I entertain no doubt that the sum tendered is perfectly ample, and the only difficulty is as to the question of costs. To mark my opinion that the tender ought to have been accepted, I shall not condemn the salvors in the whole of the costs, but in 1*l.*, *nomine expensarum*.

From this sentence the salvors appealed to Her Majesty in council, alleging that the snow and her cargo had been [*59] *rescued from a state of peril, and that the weighing of the two bower anchors and cables formed a most important ingredient of the salvage service.

Shee, Serj., and *Robinson*, Dr., for the appellants, applied to their lordships to be permitted to bring in affidavits as to the value of the ship. The salvors' agent, believing that the owners would give a fair value, did not think it necessary to extract a commission of appraisement; finding that she had been valued at 1,500*l.* only, inquiries were made in order that another survey might be held on her, but it was discovered that she had sailed for Archangel, whence she returned on the 28th August, and on the 6th September she was surveyed by the surveyor to Lloyd's at Leith, and a shipbuilder, who returned the value at 2,200*l.* The court below had awarded 100*l.* upon an estimated value of the whole property at 1,800*l.* Cited *The Oscar*.¹

Their Lordships, however, rejected the application. The appellants might have applied to the court below to stay the proceedings, or for further time, whereas no step had been taken there in this matter, and now they ask a court of final appeal to receive further evidence. The appellants had let the proper time go by, and this court could not help them.

Shee, Serj. The court below allowed nothing for recovering the anchors. The snow was in the neighborhood of dangers; she had only just got off the Newcombe Sand, and without her anchors she was in great peril. The anchors were of considerable weight, and it

¹ 2 Hagg. Ad. R. 257.

was necessary to employ the crew of *The Happy Return* in order to perform this service expeditiously. The court below considered that this yawl was not a salvor; but it is submitted that, in all fair construction, the recovering of the anchors in such circumstances was a salvage service.

LORD LANGDALE. So, after the ship was salvaged, there was another salvage service for recovering her anchors? The vessel could not go away without them. In this case, the anchors were lost in the course of the salvage service. The Wreck and Salvage * Act, (9 & 10 Vict. c. 99, sec. 19,) recognizes as a [* 60] salvage service the recovery of an anchor.

LORD CAMPBELL. That act was not intended to alter the law of salvage. It shows that the picking up an anchor is considered a salvage.

LORD LANGDALE. The anchors were not derelict: it was known where they were. It is a question of principle, whether, when an anchor is lost in the course of a salvage service rendered to the ship, and the recovery of the anchor is necessary in order to place her in safety, it is not a salvage service, and entitled to reward. *The Westminster*.¹ Independently of salving the anchors, the value of the service was not sufficiently considered. Although the weather was not tempestuous, and there was no risk of life, the coast is a dangerous one; the vessel was rescued from peril,—for the learned judge admitted that the vessel was in danger,—and it is desirable to encourage a body of persons ready and competent to render such services, which will not be the case if only 100*l.* is given out of 1,800*l.* to twenty-nine men.

Robinson, Dr., on the same side. The salvage of the vessel was not complete until the anchors were safely on board.

SIR H. JENNER FUST. Do you contend that the eighteen men in *The Happy Return* were entitled to share in the general salvage of the ship and cargo?

Robinson, Dr. It was all one service.

SIR H. JENNER FUST. Is a party coming in at the latter end of a

¹ 1 W. Rob. 229.

service entitled to share in the whole? Where was the necessity of these eighteen men being employed in getting up an anchor?

The counsel for the respondents were not heard.

JUDGMENT.

SIR H. JENNER FUST. Their lordships agree entirely in the opinion of the learned judge of the Court of Admiralty, that this case "lies in a very narrow compass indeed." The circumstances of the case are these: the vessel, bound to London from Hartlepool, with a cargo of coals, about half-past three o'clock in the afternoon of the 29th January, got on the Newcombe Sand, off the [* 61] coast of Suffolk, and * remained there for some time, the master having at first refused to accept the assistance offered him, thinking his own crew would be sufficient to get the vessel off the sand. The services of the salvors were accepted, and twenty-nine men were engaged, as stated by the salvors, from half-past five, and by the owners, from eight o'clock in the evening, until about eleven at night. Therefore, these twenty-nine men, in two vessels, were employed this time in doing what was necessary for the purpose of getting the vessel off the sand, and she was got off by these two vessels and the twenty-nine men. The learned judge in the court below was of opinion that, as soon as the vessel was got off the sand, the whole salvage service was completed. Two of the anchors were afterwards recovered, and it is contended that this was a part of the salvage service; and the question is, whether the persons employed in getting up the anchors are entitled to be considered as general salvors.

The first question is, where was the necessity of employing them at all? Were not the crew of *The Welcome Home* sufficient for the purpose? It is not stated in any one of the affidavits that they were not sufficient to recover the anchors, with the aid of the crew on board the snow.

Their lordships are of opinion that the general salvage of the ship and cargo was completed when the vessel was got off the sand, and that the getting up the anchors ought not to be considered a part of the general service. The learned judge in the court below was of opinion, taking the value of the property at 1,800*l.*, that the tender of 100*l.* was sufficient. He did not adjudicate this to be the proper sum, but he adjudicated that it was amply sufficient; that the salvors were not entitled to more, and he pronounced for that sum as sufficient, and condemned the salvors in 15*l. nomine expensarum*; and their lordships are of opinion that the sum of 100*l.* was properly

pronounced to be sufficient, and will recommend Her Majesty to pronounce against the appeal, and to affirm the sentence, considering that they are not bound to look at the services of The Happy Return unless they were necessary for salving the ship and cargo. Their lordships are of opinion that the sentence ought to be affirmed, * and, unfortunately, it must be affirmed with costs [* 62] of the appeal.¹

* THE MAID OF AUCKLAND.

[* 240]

Cause, by Act on Petition.

May 27, 1848.

Collision. In cross-actions, in which the evidence was so balanced that neither the Trinity Masters nor the Court could decide which vessel was to blame, both actions were dismissed.

THIS was a cause of damage by collision, in which cross-actions were brought between the snow Vine and the bark Maid of Auckland. The snow, of 151 tons, with seven hands, sailed from Portsmouth in ballast on the 2d February last, bound for Sunderland. According to her, at 4 A. M., on the 5th,—Scarborough Light bearing W. N. W., distant five or six miles, all hands being on deck, there being a light over the bow, the night rather dark, but vessels could be seen at the distance of half a mile,—she was lying N. N. W., close-hauled on the larboard tack, under two double-reefed top-sails and courses, the wind blowing strong from the W., when she descried the bark approaching, and the helm of the snow was instantly put hard a-weather. The master himself eased off the trysail-sheet, and the snow wore off the wind from four to six points. The bark's helm was then put a-starboard, and she bore down directly on the snow, whose master, seeing a collision to be inevitable, in order to ease the blow, put her helm to starboard, which brought her to the wind again; immediately after which, the bark with her starboard bow, struck the starboard bow of the snow, and did her considerable damage. The bark was of 320 tons, manned with thirteen hands, and bound from Newcastle to Odessa, with

¹ The committee consisted of the same councillors as in the preceding case.

coals; and according to her representation, she was lying S. by E., close-hauled upon the starboard tack, under double-reefed topsails, foresail, mizen, jib, and staysail, with the wind blowing heavy, and varying from W. S. W. and S. W. by W. The weather was thick and cloudy, the night being very dark, with small rain. The whole of the larboard watch, and also the master, were on deck keeping a good look-out. On observing the snow right a-head, the helm of the bark was put hard a-port, and *The Vine*, instead of porting her helm, as she ought to have done, put it to starboard in order to [* 241] luff across the bows * of the bark, and before the bark could answer the helm more than two points, and when her sails were shaking, the snow, with her starboard bow, struck the bark violently on her starboard bow and stove it in. It was admitted that each vessel was sailing about seven knots an hour.

The Court was assisted by Trinity Masters.¹

Addams and *Twiss*, Drs., for the snow, cited *The George*,² and *The Stadacona*; ³ *Jenner* and *Bayford*, Drs., for the bark.

DR. LUSHINGTON (addressing the Trinity Masters.) Gentlemen, I frankly tell you, if I had been left to my own unassisted judgment to determine this case, (considering that cross-actions have been brought, each party imputing blame to the other,) I doubt if I could have come to any satisfactory decision as to what was the real state of the facts, or to whom the blame was really imputable; and I doubt much whether, if I had been so circumstanced, I should not have been driven to the necessity of dismissing both actions on the ground that there was no proof satisfactory to my mind. But you have a great advantage over me, because you bring a store of nautical knowledge; and there are facts and circumstances in this case (as in many others) which will enable you to form a judgment satisfactory to your own mind, but which will not make an equal impression on the mind of one ignorant of navigation.

Having stated to you what my original impression was, I must call your attention to some of the statements in order that we may, if possible, elicit from them what the real and true facts of the case are. If it should so turn out,—I do not say that it will, for I tell

¹ Captain Wellbank and Captain Redman.

² 5 Notes of Cases, 370.

³ *Ibid.* 374.

you candidly I should be puzzled,—that you cannot satisfactorily determine as to which party was to blame in that case, the line of conduct I must adopt would be very different from what it would if you could determine on whom the blame ought properly to be fixed.

* Let us see what are the facts agreed on, and what the [* 242] facts where there is a difference in the evidence. The facts on which there is no dispute are, that the one vessel was coming from the north and the other from the south; that the one was in ballast and the other coal-laden; and with respect to the place where the collision occurred, there could not be much difficulty about that matter. It is not denied on either side that these two vessels, when they came into collision, were starboard to starboard. That is a fact which strikes my mind as of considerable importance in the ultimate elucidation of this case; but you are better able to judge than I can do what use to make of that fact, and what are the consequences to be drawn from it. You are better able than I can be to say what were the manœuvres to which these two vessels must have resorted to have brought them starboard to starboard at the time of the collision. I may have a rude guess, but I have no nautical knowledge on the matter. Then another fact not disputed is, that *The Maid of Auckland*, being laden with coals, was proceeding at the rate of seven knots an hour. You are the best able to judge how far the wind could be favorable to *The Maid of Auckland*, or how far she was close-hauled under the admitted statements of the party. Now we come to the points in question. These vessels were coming head on to each other, and it was a dark night; but it is said that vessels were visible at a distance of half a mile one from the other, and if so, it was not a very dark night. There is a difference in the quarter from which the wind blew. It is said, on behalf of *The Maid of Auckland*, to have been S. and W.; and it was originally stated, on behalf of *The Vine*, to have been W.; because, though I do not find that statement in so many words in the Act on Petition, yet it is said that the head of the snow was N. N. W., and she was on the larboard tack; and, therefore, presuming that is correct, there must have been six points between, and the wind must have been W. Now there is a difference in the statements, and, as was observed by Dr. Jenner and Dr. Bayford, if the wind was, as represented by some of the affidavits, so far to the N., it makes it difficult to believe that *The Vine* was going * with her head N. N. W., because [* 243] it would be only about five points of the wind. But, on the other hand, we must not pin down the parties too closely on a matter of this kind; we must not suppose that they had just been look-

The Maid of Auckland. 6 Notes of Cases.

ing at the compass, but that that was her general direction, and she was close-hauled at the time.

Now we come to the great difference as to what was done by each ship when they perceived each other. The Vine says, as soon as she perceived The Maid of Auckland she ported her helm; and the consequence was, she wore off with the wind from four to six points. If so, I apprehend she did perfectly right. Then she says that, finding The Maid of Auckland was approaching her, for necessity sake, and no other reason than to weaken the force of the collision, she, at the last moment, put her helm to starboard. What is the statement made on the part of The Maid of Auckland? She states that she ported her helm. It is impossible these two stories can be true. Without pretending to understand any thing of navigation, supposing the two vessels were 300 yards from each other, then, if both had ported their helms, I apprehend no collision could have taken place at all. On the part of The Maid of Auckland, it is said to The Vine, "You starboarded the helm, and that was the cause of all the mischief." You will understand better than I, supposing that The Vine ported her helm at the time, and The Maid of Auckland ported her helm, could the collision have taken place in this way, starboard to starboard?

CAPTAIN WELLBANK. Impossible.

DR. LUSHINGTON. ' Could it be that The Maid of Auckland starboarded her helm? Undoubtedly, if she starboarded her helm, and The Vine starboarded her helm too, I can conceive that they would come starboard to starboard; but I should be exceedingly puzzled to understand how the collision could take place in the manner stated, if The Vine ported her helm in time, and the other had starboarded her helm, unless The Maid of Auckland came down so fast that she took The Vine on her starboard bow before she could get away. That is barely possible. I cannot hold either vessel to blame unless you are clearly of opinion that blame [* 244] attaches to one vessel only. If you say * that blame attaches to both, then the damage must be divided; but if you say that you cannot tell which is to blame, then I must dismiss both.

CAPTAIN WELLBANK. It is very difficult to judge in favor of either vessel, and it is difficult to believe that The Vine did all that is declared. Two vessels, sailing on the courses described, the one S. and by E., and the other N. N. W., could not both be close-hauled; one must have had the wind free. The probability is, that

the wind was fair for The Maid of Auckland; for it is acknowledged, that although she was deeply coal-laden, yet she was running seven knots an hour. A vessel deeply coal-laden would scarcely run seven knots an hour by the wind. But as The Vine struck by her larboard bow, her helm could not have been put down in time to throw her head into the wind. The distance at which The Vine descried The Maid of Auckland was half a mile; but as no distance is stated by the latter vessel, the probability is that she did not see The Vine till she was too close to her to avoid her.

PER CURIAM. Are you of opinion that The Maid of Auckland was to blame?

CAPTAIN WELLBANK. I should say, if I am to believe The Vine, she did nothing wrong; if I am to believe the statement of the other vessel, it is very clear that she did not see The Vine till she was close upon her. But if I were to form a judgment in the case, independently of the nautical questions, I should say that both vessels were to blame. These are very difficult cases to decide where there is such a conflict of evidence. It is difficult to believe both statements. If people would but speak the truth, it would be easy to come to a conclusion.

PER CURIAM. It certainly is an undoubted truth, as observed by one of these gentlemen, that if we could get true statements in these cases, we should travel to a conclusion with very considerable facility; but I am afraid that the records of this court show that there scarcely ever was a case in which there was a true statement of facts on both sides. It unfortunately happens, that on the pre- [* 245] sent occasion, whatever might have been the nature of the collision between the two vessels, the collision between the evidence is at least equal. I am anxious, as I ought to be, to do entire justice between the parties, and I cannot do justice by deciding in favor of either party, without a conviction that the party against whom the decision is given is wholly and solely in the wrong; for I must not only say that one party was to blame, but that the party in whose favor I decide was not to blame at all. Now I have no means of concluding this in a manner satisfactory to myself. I am in this condition with regard to both vessels, that I must say, (as is sometimes the case in another court,) that, in my opinion, *deficit probatio*; that is, that the evidence on both sides is so balanced, that, notwithstanding I have had the benefit of the advice of two gentlemen with nautical experience, which they can apply to the facts,

The Ripon. 6 Notes of Cases.

the court cannot come to a satisfactory conclusion as to which vessel was to blame, and this leaves open to me only one course, — namely, to dismiss both actions, without costs.

THE RIPON.

Cause, by Act on Petition.

May 27, 1848.

Collision. A brig, moored in the Thames, is in mid-day run into by a steamer having a duly-licensed pilot on board, who ordered the engines to be stopped and reversed — Held, that the engines were not reversed, so promptly as they might have been, and as the evidence of the engineers was not produced, that the pilot was not solely and exclusively to blame, and the owners, therefore, were not exonerated.

THIS was a cause of damage by the owner of the Swedish brig Oscar, against the steam-vessel Ripon, belonging to the Peninsular and Oriental Steam Navigation Company. The act, on behalf of the foreign owner, alleged that, about 3 P. M. on the 8th February, The Oscar was lying moored to the Blackwall buoy, where she had brought up to take in ballast, when The Rippon came steaming up the Reach, (which was quite clear,) at a great pace, with the flood tide in her favor; that when about 300 yards from the brig, the pilot on board the steamer ordered her engines to be stopped and reversed: but, though stopped, they were not reversed until some minutes after the order, and the steamer struck the brig on the starboard bow, doing her considerable damage; that if the engines of The

[*246] Ripon had been reversed at * the time the order was given by the pilot, (which they were not, owing to some defect in the engines, or to want of prompt obedience by the engineers or others,) the collision would have been avoided; and that blame was attributable to the master of The Ripon in persisting, contrary to the advice of the pilot, in returning up the river with the flood tide, instead of waiting till the ebb tide had begun to make. The answer on the the part of The Ripon set forth that certain alterations in the vessel, for which purpose she had been brought to London from Southampton, (her usual station,) having been completed, it was determined to take her for a trial trip down the river Thames; that, on the day in question, the master took on board, at Blackwall, a duly-licensed pilot, under whose charge The Ripon proceeded on her trial trip, against a flood tide, for ten or twelve miles, when the

master consulted the pilot as to her return, who stated that he should prefer waiting for the ebb tide, but he had no objection to take her back with the flood tide, if the master wished, and the master expressing such wish, the pilot gave directions for the return; that, on coming in sight of the shipping at Blackwall, (on the passage up,) the pilot gave directions to slacken the speed of The Ripon, and she proceeded, from such time, at about half-speed, (from five to six miles an hour); that off the point of land opposite Wigram's Dock, at Blackwall, about fifteen ships were very near together, some floating up with the tide, and others at anchor, and, in order to avoid them, The Ripon was steered in to the Middlesex shore, into which the tide ran strongly, when The Oscar was first seen, having been previously concealed from view by the ships, and at the same time a large barge was also for the first time seen drifting up with the tide and in the course of The Ripon; that The Oscar was made fast to another vessel, which was moored to the Blackwall buoy, and the tide was carrying the barge over towards her; that the pilot on board The Ripon shaped her course so as to avoid the barge, and pass between her and the brig, the master warning the pilot that "he would be into the brig," but the pilot did not alter The Ripon's course; that just before the collision, the pilot ordered her * engines [*247] to be stopped, which was done, and soon afterwards ordered them to be reversed, which was also done immediately the order was given; but it was no sooner acted upon than the steamer, having cleared the barge, came in contact with the brig; that all the pilot's orders were promptly and effectually executed, and that he alone was to blame for the collision; that there was no defect in the engines on board The Ripon, which were in perfect condition and working order. The reply, on the part of The Oscar, alleged that the pilot had declared that the collision was to be attributed to the causes assigned in the act, and that he had declared that, after the accident, the master of The Ripon wrote a letter to the company exonerating the pilot from all blame, but that the pilot, though often requested to make an affidavit touching the premises, refused to do so.

The refusal of the pilot to make an affidavit being brought to the notice of the court,

PER CURIAM.

If an affidavit is produced as to the fact of his refusal, I will issue a *subpœna* for him to appear here any day the court sits to undergo examination.¹ The *subpœna* will be open to all just objection. The

¹ By virtue of 3 & 4 Vict. c. 65, s. 9.

act on petition is silent as to whose witness he will be; but I apprehend he will be a witness of the court.

(The pilot, as will appear, subsequently consented to make an affidavit.¹)

The court was assisted by the same Trinity Masters as in the preceding case.

Jenner and Bayford, Drs., for The Oscar. The question is, whether the owners of The Ripon or the pilot be responsible. The former, to make out their exemption, must prove that the whole blame is attributable to the pilot exclusively; but the result of the evidence [*248] shows that the accident arose *principally from a defect in the engines. The main issue is, whether the engines were in order or not, and no engineer, nor even a stoker has been produced. If the court is not satisfied, beyond all doubt, that no blame attaches to the master or crew, and that the engines were in perfect order, we are entitled to judgment in our favor.

Harding and R. Phillimore, Drs., for The Ripon. The pilot was in charge of the vessel, and we have shown that all his orders were duly obeyed. The George.²

DR. LUSHINGTON (addressing the Trinity Masters.) Gentlemen, before I call your attention to the particular facts of this case, it is requisite that I should point out to you what the law on the subject, generally speaking, is.

The words of the act, 6 Geo. IV. c. 125, s. 55, are these: "No owner or master of any ship or vessel shall be answerable for any loss or damage which shall happen from, or by reason or means of, any neglect, default, or incompetency, or incapacity of any licensed pilot acting in the charge of any such ship or vessel, under or in pursuance of any of the provisions of this act." Now, to relieve the vessel which has done the damage from responsibility, you *must* be satisfied that she, having a pilot on board, the damage was done by reason or means of his neglect, default, incompetency, or incapacity. If you are not satisfied of that, this case does not come within the

¹ In this affidavit, the pilot, (C. T. Ferguson,) deposed, that when he gave orders for the engines of The Ripon to be reversed, "from some cause unknown to him, the engines were not reversed so soon as the order had been given, and consequently not in time to prevent the damage."

² 4 Notes of Cases, 161.

exception. I never, to the best of my knowledge, have held, on any previous occasion, any doctrine in the slightest degree inconsistent with that which I am now laying down,—namely, that, to exempt the owners, the fault must be solely and exclusively that of the pilot, not shared in by the master or crew. Dr. Harding cited the case of *The George*. That was a very peculiar case, but it does not appear to me in any degree to conflict with the observations I am now addressing to you. I was assisted in that case by Captain Hayman and Captain Probyn, and the defence was put upon two grounds: first, that the night was so extremely dark, and the wind so strong that the accident was unavoidable; secondly, that

* *The George* had a pilot on board, and that, consequently, [* 249] the owners were exempted from responsibility. I put to them two questions, first, whether the night was so dark that, however good a look-out might have been kept, the accident was inevitable; or whether, if a proper look-out had been kept, it might not have been avoided. The Trinity Masters were of opinion that the pilot did extremely wrong in bringing the vessel, in the manner he did, into King's Road; therefore, I could not hold the owners responsible on that ground; and with regard to the question of proper look-out, their being a deficiency of evidence on that point, I dismissed the owners. But that does not in the slightest degree militate against the doctrine I lay down to you, that a party charged with doing damage, in order to exempt himself from responsibility, must show that he falls within the 55th section of the act, and that the damage arose from the misconduct of the pilot alone. Being so, the question I shall have to put to you is this: whether the collision is proved to have been owing solely and exclusively to the neglect, default, or incompetency, or incapacity of the pilot? If it is proved that the collision arose solely and exclusively from the default of the pilot, then the owners must be exonerated; but if you are not satisfied of that fact, then the owners must take the ordinary responsibility; they do not fall within the privilege of the act of parliament, and cannot claim it.

The facts of this case are these: The *Oscar* was lying moored off Blackwall, and the other vessel was a steamer, coming up under the charge of a pilot. I do not put the question to you, whether the collision arose from the fault of any others than those on board *The Ripon*. Here is a vessel lying moored at mid-day, and to put a question to you whether the steamer was to blame, or whether *The Oscar* was to blame, would be trifling with your understandings. I may state, on my own responsibility, that some one on board *The Ripon* was in fault, be he who he may. What is the next question? How

did the accident arise? *Primâ facie*, it might be sufficient to answer, that it arose from the default of the pilot, as the vessel was [* 250] in his charge. But it * is alleged that it was not the fault of the pilot, but of the machinery, or of the persons who worked the machinery. If it was the fault of the machinery, in that case the owners are responsible.

With respect to the evidence in this case, it does not exactly come forth with that clearness which the court would desire; but yet know from experience how seldom we do get evidence in a shape that will lead to a satisfactory judgment. The first question that strikes me is, how comes it that the engineers are not examined? It is stated in the act, that orders were given for reversing the engines, "but which they were not, owing either to some defect in the engines themselves, or to the want of prompt obedience to such order on the part of the engineers or others in the service and employ of the owners of the steam-vessel." Why, surely, when such an averment was made, the only person competent to give the best evidence upon the point were the engineers, who received the orders. They could have said whether the engines were capable of being stopped with due promptitude; whether they executed the order, but that there was an impediment, and they could not make the engines act; or, on the other hand, that there was no difficulty, and that the order was executed and the engines were instantly stopped. But how does the matter stand? We actually have no evidence from any person on board The Ripon which throws any light upon this question at all; for all that the captain says is, "that he heard the pilot order the engines to be stopped and reversed, and heard the man stationed on deck to convey such orders to the engineer in the engine-room below, deliver such orders, which were immediately attended to, and the engines were stopped and reversed, which can be done in a minute and a half, and was done as soon as possible." That is all: but that is not satisfactory, for though no doubt the master speaks to the best of his knowledge and belief, the master does not state the particular order and the condition of the engines at the moment: no one except the engineer could speak with precision to these particular facts. I am bound to say, with regard to the affidavit of the pilot, that we must look at it with a con- [* 251] siderable degree of scrutiny, because he swears * to exonerate himself from blame, and in such a case a person will always endeavor to go as far as he can to relieve himself from penal consequences. He swears that he did give the order in time, but that, from some cause unknown to him, the engines were not reversed as soon as the orders were given, and consequently not in

time to prevent the damage. Now this evidence, it is said, is inconsistent with that of George Rooke and James Tyler, watermen, and others on board *The Oscar*. I am bound to make the observation, that I see no discrepancy in the evidence at all; looking at the facts of the case and the ordinary mode in which evidence is given by persons seeing such an accident, as to the precise instant of time, — whether the paddle-wheels turned backward or not at a particular moment, — as to these matters, witnesses will always vary one way or the other: and, as to any discrepancy that would throw discredit on the evidence, I think there is none. The question is, whether the engines were reversed in sufficient time to have an effect upon the vessel, and did turn her backwards in time. The question I put to you is, whether the collision was caused solely and exclusively by the neglect of the pilot?

CAPTAIN WELLBANK. I am not prepared to say that the collision arose from the neglect or any particular fault of the pilot. It was flood tide, and the engines ought to have been stopped in good time: 300 yards at one time of the tide might have been sufficient, nearly at the top of high water; but at the full flow of the tide it would not be sufficient. Considering the dexterous manner in which steam-vessels are managed in the river, it might be in some cases; one vessel may be more manageable than another, and a small vessel acts more quickly, and will answer the engine more readily than a larger vessel will do. I do not think, therefore, that it was entirely the fault of the pilot; and it does not appear that the engines were reversed so promptly as they might have been. I do not think the pilot was entirely in fault.

PER CURIAM.

You are of opinion that the engines were *not reversed [*252] with the promptitude that ought to have been expected; that some blame attaches to the pilot, but that he is not solely and exclusively in fault?

CAPTAIN WELLBANK. Just so; a good deal would depend upon the state of the tide; if the tide had been slack she would have moved much more rapidly.

PER CURIAM.

Then I understand your opinion to be this: that the collision arose from the default of some person or persons on board *The*

Ripon, but that it did not arise from the fault of the pilot exclusively?

CAPTAIN WELLBANK. It did not.

PER CURIAM. I must pronounce for the damage.

[* 271]

* THE FLINT.

Cause, Act on Petition.

June 17, 1848.

Collision. On a dark night, sailing vessels, coming suddenly upon each other, are not altogether absolved from the duty of observing the Trinity House rules; generally speaking, it is desirable that the general rules should be adhered to strictly.

THIS was an action by the owners of the schooner *Elizabeth Mary Ann* against the brig *Flint*, to recover the amount of damage sustained in a collision between the two vessels in the Mediterranean, in the night of the 14th October, 1847; a cross-action being entered by the owners of *The Flint* against the schooner. Both vessels were homeward-bound, the schooner with a cargo of dye-wood from the Levant; the brig with grain from Odessa. The wind was blowing hard from the W. The schooner was standing to the N. N. W., on the larboard tack; the brig was on the starboard tack, and standing to the S. On the part of the schooner, it was alleged, that on seeing a sail a-head, they showed a light, which was answered by the stranger, who appeared at first to keep away, but the master seemed confused, and the brig immediately afterwards luffed; then bore away again, and ran stem-on into the schooner, and the owner alleged that the collision was owing entirely to neglect and bad seamanship on board the brig. On the part of the brig, it was alleged that the night was dark and thick, and that the collision was caused by bad seamanship on board the schooner.

The court was assisted by Trinity Masters.¹

¹ Captain Ellerby and Captain Shepherd.

Haggard and Bayford, Drs., for the schooner. The owners of the brig have stated themselves out of court. * Our [*272] duty, being on the larboard tack, was to put our helm up, which we did, and kept it up. The brig's helm, it is admitted, was put first one way and then the other.

Addams and Twiss, Drs., for the brig. The other vessel was to blame on her own showing. They say in their protest, that, on seeing the brig standing to the S., the schooner merely showed a light; whereas, being on the larboard tack, she ought to have given way immediately, and, had she done so, there would have been no collision. This being a dark night, the Trinity House rules do not apply; the vessel on the larboard tack is not to speculate, but at once give way; and if the brig did wrong at a subsequent period, she would be relieved from the consequences, being misled by the misconduct of the other vessel. The Stadacona.¹ The Stranger.²

DR. LUSHINGTON, (addressing the Trinity Masters.) Gentlemen: It is clear that the schooner was on the larboard tack, and The Flint on the starboard, and no one can doubt, that under these circumstances, according to the ordinary rule, it was the duty of the schooner to give way, and of The Flint to keep her course. It has been contended, in the argument for The Flint, that in consequence of the extreme darkness of the night, and the vessels not having discovered each other till they were close together, the ordinary rules of the Trinity House might be dispensed with. But I am not inclined at all to favor that conclusion. I do not say there may not be cases in which it is perfectly impossible to apply those rules without some great misfortune occurring. For example: suppose a vessel was close on a reef of rocks, or, again, that two vessels were so very near when the first saw each other that it was next to impossible to take the proper and ordinary measures which would be pursued if they were at a greater distance. But on all dark nights, generally speaking, it is very desirable that the general rule should be adhered to strictly.

Now let us see what was done by each vessel; and I * think the fairest course is to take the facts from the pro- [*273] tests of the two vessels. The protest of The Flint states: "On the 15th, first part, strong breezes from W. and by N.; at 4 P. M. the gale increasing, double-reefed the topsails, the vessel

¹ 4 Notes of Cases, 374.

² *Antea*, 38.

laboring much, and making much water; the pumps duly attended to. At 8 P. M. tacked ship, the course being N. and by W." Now you will form your opinion as to what direction she was sailing in at that time. Her course was N. and by W., no doubt; but as to which way her head was, you will form your own opinion from the statements made here. The statement on behalf of The Elizabeth Mary Ann is, that it was to the southward. "At 11 P. M., the look-out forward called out, 'A sail on the lee bow,' which showed a light, and was immediately answered by exhibiting one from The Flint. Finding that the vessel was on the opposite tack, the appearers put their helm hard a-weather." Now, the first question is, whether they ought to have done that. According to the ordinary rule, I apprehend they ought not:—"and the look-out called out that the other vessel was keeping away"—if she was doing that, I apprehend, she was doing right—"and they again put down their helm; that the master, (one of the declarants,) went forward, and seeing that the other vessel was a schooner by the wind, he ordered the helm to be again put hard a-weather, which was done accordingly." In consequence of which the collision took place; that is, as I apprehend, by his taking an erroneous step in putting *his helm* hard a-weather. It appears to be quite clear, from this statement, according to my apprehension, that at least The Flint was to blame. Now, let us see what was done by the other vessel. In their protest it is stated: "That at 11.15 P. M. they saw a sail ahead, standing to the S.; that they immediately showed a light, which was answered by the stranger; that the stranger appeared at first to keep away, and immediately afterwards to luff; that the schooner being on the larboard tack, she was kept away, and the main peak dropped; that the stranger bore away again, and ran stern on into The Elizabeth Mary Ann." Now, upon this, the point raised is, did or [*274] did not The Elizabeth Mary Ann improperly delay the measures she did adopt? That will be for you to determine. It appears that her crew were on the alert; that they saw the other vessel in the first instance, and they hoisted a light—the vessels could not be very close together at the time—and the light was answered. Was it, or was it not, incumbent upon her instantly to bear away; or ought she to have taken time to exercise reasonable discretion as to what course the other vessel was going to pursue, and what she was about to do? It appears, according to the protest of The Flint, that, as soon as they perceived the light, they exhibited another, and immediately put her helm hard a-weather, which was, as I apprehend, an erroneous measure.

There are two questions for you to determine: first, do you

believe The Flint was to blame? or, secondly, do you consider that the accident was in any degree owing to any neglect or improper delay on the part of The Elizabeth Mary Ann? I fully admit that neglecting to do that which was right till it was too late must be a ground of imputing blame. But the question is a matter of fact: did she lose time improperly or not, considering the movements of The Flint? With regard to the darkness of the night, it appears to me that that is not a question in this case; for in the proceedings, I find that the defence on the part of The Flint is, not the darkness of the night, but they allege that every means was used to avoid the collision, and it was entirely owing to carelessness and bad seamanship on the part of the master of the schooner. So that it is no part of my duty to put the question to you, whether the darkness of the night did or did not cause the accident. You will please to say whether, in your opinion, The Flint was alone to blame, or whether any part of it attaches to The Elizabeth Mary Ann.

CAPTAIN ELLERBY. We think the sole blame is attributable to The Flint. Observing a wrong movement on the part of the brig, the schooner was justified in pausing; and it appears from the statement of the master of The Flint, that he is quite unacquainted with the ordinary rules of navigation.

* PER CURIAM. I pronounce for the damage, and dismiss [* 275] the cross-action.

THE GLOBE.

Cause, by Act on Petition.

June 17, 1848.

Collision. Where two vessels were coming up the Thames, with the tide, and one of them endeavored to pass the other, which was drifting, and which was at the moment caught by a squall, and a collision followed.

Held, that the vessel endeavoring to pass the other was bound to take measures to enable her to do so safely, and that, not having done so, was liable for the damage.

THIS was an action by the owners of the brig Elizabeth against the brig Globe, to recover the amount of damage occasioned by a collision, in the forenoon of the 7th December, 1847, in the river

Thames. Both vessels were coal-laden, and were proceeding up the river. The *Elizabeth*, of 141 tons, was going to her destination in Woolwich Reach; The *Globe*, of 233 tons, was proceeding to Bugsby's Hole. The wind, according to The *Elizabeth*, was W. N. W.; according to The *Globe*, W. N. W. to N. W., with heavy squalls, which, it was alleged, compelled The *Globe* to make several tacks, in order to come up with a flood tide. The boat of The *Elizabeth* having got loose, she was delayed, and shortly prior to the collision, she was drifting up with the tide, her head being N. N. E. The *Globe* attempted to pass her, and put her helm to starboard for that purpose, (she being then on the starboard tack,) but, as alleged by The *Elizabeth*, not until it was too late to avoid coming in contact with her. On the part of The *Globe*, the accident was attributed to a heavy squall coming on, which took The *Elizabeth* and payed her head off to the eastward, and at the same time split the foretopsail of The *Globe*, and broke the fall of her boom foresail, whereby she unavoidably came up towards the wind, notwithstanding the peak of her trysail was immediately lowered and the sheet eased off.

The court was assisted by the same Trinity Masters as in the preceding case.

Addams and Bayford, Drs., for The Elizabeth. If The *Globe's* helm had been starboarded in time, or if she had tacked, she would have avoided the collision, which was owing to bad management and unskilfulness on her part.

Haggard and Harding, Drs., for The Globe. Our case is, [* 276] * that immediately before the collision we were put into a helpless state by a sudden and unexpected squall, which, after taking The *Elizabeth*, split our sail and drove us into collision.

DR. LUSHINGTON, (addressing the Trinity Masters.) *Gentlemen:* It appears, that shortly prior to this collision, The *Elizabeth* was drifting up with the tide, with her head N. N. E. It was the intention of The *Globe* to pass by The *Elizabeth*, which it is alleged (it is for you to judge whether it was so) at that time was in a state in which she was not capable of doing much to alter her position, drifting up with the tide; and The *Globe*, in endeavoring to pass her, was bound to take such measures as would enable her to do so with safety. Whether that was to be done by putting the helm to starboard or to port, whatever was done, it ought to have been done with due

* regard to the safety of The Elizabeth, and the state of the wind and weather. This being so, the Elizabeth being unable to help herself, the presumption of law and of common sense is, that The Globe was to blame, because she was the actor; and the true question for consideration is, whether The Globe has set up a good defence; whether she took such measures as would have enabled her to pass with safety, if she was not prevented by the weather, or by some fault of those on board The Elizabeth. Let us see how the case stands.

It appears The Globe put her helm to starboard, being at that time on the starboard tack; and her defence is the following, stating it as plainly and clearly as I can: that a squall of wind came on, in consequence of which The Elizabeth ran into The Globe; that her braces having been let loose, and her foresail not having been hauled up, her yards flew round, her sails filled, and her helm being put hard a-weather, she ran ahead. Now you must judge both as to the fact and as to the effect of that fact, not merely whether the squall came on, or whether it produced certain effects upon The Elizabeth; but whether the result would be that The Elizabeth became, to a certain extent, the author * of her own mischief, though [*277] innocently. It is said further, on behalf of The Globe, that the squall split her foretopsail and broke the fall of her boom foresail, "whereby she unavoidably came up towards the wind, notwithstanding the peak of her trysail was immediately lowered, and the sheet eased off." That, in other words, is attributing the collision to an unforeseen calamity, namely, the squall, which could not be foreseen or guarded against, and was one of the contributing causes of the accident. But I hold in my hand the affidavit of Smith, the master of The Globe, and he says, that notwithstanding what happened to his vessel, she would have gone clear of The Elizabeth, had The Elizabeth not run ahead. Therefore, you will perceive his defence is joint — partly what the squall did, and partly what was improperly done by The Elizabeth.

You will take these circumstances into your consideration, and will bear in mind, that, according to the master's statement, the wind had been blowing hard from the W. N. W. with heavy squalls, and consider whether, under these circumstances, having reason to expect a squall, he ought not to have taken ample room, so that no unexpected squall might have brought him in contact with the vessel.

These are the facts of the case, and, if you please, we will retire into the next room, and consider to what conclusion these facts and circumstances should lead us.

(After retiring.)

PER CURIAM.

The gentlemen by whom I am assisted, having taken into consideration all the circumstances of this case, have declared to me their opinion, that the blame falls exclusively on The Globe. I concur in that opinion, and, therefore, of course, I must pronounce for the damage.

THE KING OSCAR.

Cause, by Act on Petition.

June 23, 1848.

Salvage. A pilot, who had boarded a foreign vessel which had suffered damage, in boisterous weather, and was engaged by the master to take charge of her as a pilot, and who brought her to a place of safety, allowed to claim as a salvor. Application of the rule respecting pilots claiming as salvors, to foreign vessels.

THIS was an action by the master, owners, and crew of the pilot-cutter Neptune, thirty-eight tons, of Cowes, to recover a compensation for salvage services rendered to the Swedish brig King [* 285] * Oscar, 308 tons, coal-laden, bound from Newcastle to Rio Janeiro, which, when in the Bay of Biscay, encountered a severe storm that lasted for several days, in the course of which she carried away her bowsprit, and sustained damage in her sails and rigging. On the fourth day, the gale continuing, the master resolved to put into Lisbon, but the wind becoming adverse, he steered for the English Channel, and on the 27th February, neared Falmouth, but being unable to meet with a pilot, continued his course up the channel, (the wind blowing heavily from the S. W.,) steering for Cowes. About daybreak next morning, when off St. Catherine's Point, the brig was descried by the pilot-cutter, which bore down to her, and two of the cutter's crew boarded the brig, and, (as they alleged,) took charge of her, The Neptune following, and brought her to Sandown Bay, where, the wind changing to W., the cutter, at much risk, took the brig in tow, as far as Spithead, where she was anchored. Next morning, the cutter took the brig again in tow until a government steamer came near, and, taking her away, towed her to Cowes. The salvors contended that, owing to the bad weather and the crippled state of the brig, its preservation was solely attributable to their services. On the part of the foreign owners, it was alleged that the

brig wanted only a pilot, and when the two men came on board, one of them stated that he was a Cowes pilot, and was engaged in that capacity to take charge of her; that the towing of the brig by the cutter was in opposition to the wish and remonstrance of the master, who insisted upon the cutter being cast off, and upon the pilot's refusal, protested against it, in the presence of the crew, as being done in spite of his orders; that when the brig was brought up at Spithead, the master went ashore at Cowes to make arrangements for getting her into the harbor, and next morning a steamer was sent to tow her; but before she arrived, the pilot, without authority, had got the brig under weigh, towed by the cutter; and that none of the alleged salvors had been engaged except one solely in the capacity of pilot.

Jenner and Bayford, Drs., for the salvors. In the state of this vessel and of the weather, this cannot be characterized as a mere pilot service. If the towing was, as asserted, contrary to the wish of the master, he had only to order the crew to cast the cutter off.

Addams, Dr., for the owners. The doctrine of this court undoubtedly is, that mere pilotage is not sufficient where the vessel is in any degree of distress; but this vessel was in no distress, and the master, a foreigner, needed only a pilot. If it is a salvage service, it is one of the slightest kind.

DR. LUSHINGTON. It was observed in the argument, that the rule which this court has generally applied to the consideration of these cases might not be strictly applicable to foreign masters, the rule being, that as our pilots are rewarded by rates specified in acts of parliament, and regulated by rules, they are entitled to a larger degree of remuneration where vessels, to whose assistance they come, are in a state of distress. This is a rule which the court would be very reluctant to relax, because the rate of pay to which pilots are entitled has been estimated upon the principle, that the only service they have to perform is pilot service, and that they will not be subjected to any great risk or danger. Nor do I see any sufficient reason why, if the rule be applicable to such a case as this, I should relax it on behalf of a foreign master. Foreign masters always receive the same measure of justice as is meted out to English masters and English owners, and to more than that they cannot in equity be entitled.

With regard to the circumstances of this case, the previous facts are only of importance as showing the state and condition of the vessel on the 28th February; and it certainly does appear that she had been exposed to very tempestuous weather and very considerable danger. The weather they encountered in the Bay of Biscay, and the loss of their bowsprit, they say, rendered it impossible for them to remain at sea, — and that is not an unimportant consideration in the case, — and having vainly endeavored to reach the [* 287] port of Lisbon, they steered for the British Channel, * scudding under bare poles. "On the 26th," they state, "the gale increased, and blew a perfect hurricane, and it being dangerous to scud, they hove the brig to, having a studding sail spread in the main rigging; that, whilst lying to, the main topsail was blown loose from the gaskets and split to pieces, the remnants of which, beating and flapping about with the utmost violence, they were compelled to cut away, with the running rigging, blocks, and gear attached thereto; that, on the 27th, at 4 P. M., being in the channel they kept away from Falmouth, but not falling in with any pilot, and the wind continuing from the S. W., the weather thick, they concluded to continue their course up channel, and make for Cowes:" in other words, the object was, as it necessarily must have been, in consequence of the damage the vessel had received, to make for some place of safety; they could not get to Lisbon, nor enter Falmouth, and they steered for Cowes, as the next place of safety. It is said they proceeded up the channel with great expedition; true, the gale drove them on. Then, on the morning of the 28th, they were off the Isle of Wight, as they state, with moderate weather, and at 8 o'clock they fall in with a Cowes pilot, who goes on board. There is a considerable dispute whether he was justified in taking the vessel in tow of the cutter; and it is said that a cutter of thirty tons could do but little. I think, considering that both the persons who went on board were first-class Trinity pilots, it is to be presumed, if they erred at all, that they erred from ignorance; it is not to be urged against them, without proof, that they wilfully adopted an improper measure in order to enhance their own claim. According to the affidavit of Richard Cows and others, the wind and tide were averse to their proceeding to Cowes. I see no reason to find fault with these persons; but the service lasted but a short time, and they are not entitled to a large reward, and I do not think I shall give too much when I allot them 80*l*.

The following case of an unsuccessful attempt by a pilot to obtain

* salvage from a foreign master, has not been hitherto re- [* 288] ported:—

THE JOHANNES.

January 22, 1835.

THIS was a Prussian brig, with a valuable cargo, (worth, with the ship, 5,000*l.*.) bound to Stettin from New York, which, on the 22d October, 1834, when off the Sussex coast, sprung her foremast and jib-boom, which were, however, to some extent, secured. Her sails were uninjured. On the 23d she met a pilot-boat, and took a pilot on board, who carried her round Dungeness, and anchored her on the west side of the promontory. The wind, which was at this time W. N. W., changing, it became necessary to anchor on the other (the eastern) side, and the pilot took her round, and she came to an anchor between the Lighthouse and Battery No. 1, where she remained, a short distance from the shore, till the 26th, when the wind shifted from N. W. to N. N. E. or N. E., and, the eastern side of Dungeness not being a safe place to continue in, so near the shore, the master slipped his cable and put out to sea. At this time, whilst the brig was under sail, James Anderson, the pilot, who had taken charge of the vessel on the 23d, (and who had been paid his pilotage,) came on board the vessel with other men and offered to take her to Dover Roads. The description given by Anderson of the state of the brig was, that there was a tremendous sea running; that vessels were cutting and slipping their cables, and that the brig was in imminent danger of driving upon the Rower or Newcombe Sands. The brig reached Dover in safety, and Anderson made a claim for salvage, alleging that the foreign master had tendered him 50*l.*, but he thought it better to have the matter adjudicated upon by the Commissioners at Dover. The vessel was arrested for 400*l.*, and the owners tendered 15*l.* 15*s.*

The evidence was very contradictory.

Phillimore, Dr., for the salvors, contended that the service rendered to the vessel, driven from her anchorage in bad weather, near a dangerous sand, the master and crew being ignorant of the navigation and of the English language, merited a liberal reward.

Sir J. Dodson, K. A., for the owners, denied the tender of 50*l.*, and characterized this as an attempt at extortion. Anderson had come on board without being asked or needed; he offered to pilot the brig to Dover Roads for the regular pilotage, and this offer was accepted.

* *SIR JOHN NICHOLL*. This question depends upon whether this is a [* 289] salvage service, or a mere case of pilotage. If a real salvage service has been performed, perhaps the tender may be insufficient, considering the magnitude of the property saved from risk and danger, if so saved. On the other hand, if it is a case of mere pilotage, and an attempt has been improperly made to extort from foreigners a larger sum than pilotage, the tender is not only sufficient, but the party who has attempted to enforce such an improper demand will be subject to the costs of the proceedings to which the owner has been put in resisting it. The court does not lay it down, that in no case can a pilot be converted into a salvor, or that where a pilot has rendered assistance to a vessel, in circumstances of danger, beyond ordinary

pilotage, he is not entitled to a higher remuneration than he could legally claim as a pilot merely.

(After detailing the facts, and remarking upon the inflated account given by the salvors of the "tremendous sea," whereas Anderson boarded the brig in a small boat, which was then taken back by one man, who "sculled" it, by the use of one oar in the stern.)

What was the danger which should give this service the character of salvage? It is mere pilotage by a man who has given an exaggerated representation of the case. Reference has been made to a case decided by Lord Stowell, in 1799,¹ in which the learned judge observed, that the affidavits of the asserted salvor "are not deficient in exaggeration, but seemed to be touched up with a pretty high degree of coloring." The cases are a good deal alike, and dressed up in a similar manner in the affidavits. These are the grounds upon which the learned judge decided the case: that the ship had not been in any distress; that the pilot did wrong in bringing her into Ramsgate; and he added: "I think it is a claim set up with the most unpardonable effrontery, and I am very sorry that I cannot do more than dismiss this petition with costs, and report the conduct of the petitioner to the Trinity House." If a tender of 50*l.* was made in this case, (which is expressly contradicted,) it was an extreme degree of folly not to have accepted it; for what was done beyond pilotage? The case set up is exaggerated, and a fraudulent attempt to extort salvage from a foreigner. I am satisfied upon the whole of the evidence that this is not a case of salvage, but a mere case of pilotage. In all cases where a real and *bonâ fide* case of salvage is made out, the court is in duty bound, and it is its inclination as well as its duty, to allot a liberal reward, to encourage the rendering assistance to vessels in distress. A [* 290] liberal * allowance for services of this kind is not only for the general interests of commerce and the service of navigation, but for the benefit of underwriters. But, on the other hand, if licensed pilots, to whom the legislature has given special privileges and exclusive rights, — no other person being allowed to act as a pilot within certain limits, — lend themselves to attempts at extortion upon foreigners, it is the duty of the court to repress them; and I pronounce against this claim, and that the party is liable to the costs from the time of refusing the tender. And I direct that the tender be not paid out to the party, but go *pro tanto* in part payment of the owner's costs; and I shall consider whether it is not a matter of duty on the part of the court to report the conduct of Anderson to the Trinity House.

¹ The Joseph Harvey, 1 C. Rob. 306.

THE LORD SAUMAREZ.

Cause, by Plea and Proof.

December 21, 1848.

Collision between a sailing-vessel and a steamer during a fog.

Held, that the sailing-vessel was to blame. The carrying of studding-sails, in such circumstances, imprudent.

THIS was an action by the owners of the steamer *Trident*, belonging to the Steam Navigation Company, to recover the amount of damage occasioned to their vessel by a collision with the brig *Lord Saumarez*, on the morning of the 6th January, 1848, in the neighborhood of Orfordness. The *Lord Saumarez*, coal laden, was proceeding from Hartlepool to London; the steamer, of 617 tons, with engines of 130 horse power, was on her passage from London to Leith, with goods and passengers. The weather was foggy; the wind was alleged by The *Trident*'s owners to have been N. N. E., and by the other party N. N. W. A cross action was brought by the owners of The *Lord Saumarez* against The *Trident*. Each party charged the other with want of *good look- [* 601] out; the steamer taxed the brig with carrying too much sail, and with starboarding her helm instead of porting it; and the brig attributed the accident partly to the fog, which] brought her suddenly into near contact with the steamer, and partly to the latter having ported her helm instead of keeping her course.

The court was assisted by Trinity Masters.¹

Addams and *Robinson*, Drs., for the steamer, cited The *Virgil*.² *Harding* and *Bayford*, [Drs., for the brig, cited The *Itinerant*,³ and The *Wirral*.⁴

DR. LUSHINGTON, (addressing the Trinity Masters.) Gentlemen: It appears, that shortly previous to, and up to the time of the collision, The *Lord Saumarez* was proceeding under all her sails set, with the exception of having taken in her lower studding sails; and

¹ Captain Ellerby and Captain Farrer.

² 2 W. Rob. 201.

³ 2 W. Rob. 236.

⁴ 3 W. Rob. 56.

it has been contended, on the one side, that, considering the state of the wind and weather, and the locality, The Lord Saumarez ought not to have carried so large a press of sail; while on the other hand, it is said, that whatever might be the quantity of sail she carried, it was not at all instrumental to the collision, and to the damage in question. In support of the latter averment, the case of *The Itinerant* was cited. Now it is most important that this question should not be subject to misapprehension, and you will excuse me for referring to what took place in *The Itinerant*, and showing what is the real principle which the court adopted, sanctioned by the gentlemen of the Trinity House in this matter.

Perhaps I had better first state the general principle. When a ship is carrying a great press of sail, it does not necessarily follow, though it may be an act of imprudence, that it contributes to the collision itself; and if it is not the cause of the collision, but simply [* 602] an act of imprudence, not * promoting the collision, it is a circumstance to be entirely laid out of the case. But if, on the other hand, looking at the state of the wind and the weather, an improper press of sail was contributory to the collision, then it is a misdemeanor for which the party so acting must suffer. In the case of *The Itinerant*, when I had the pleasure of being assisted by gentlemen from your board, I recollect perfectly well that they considered it a case of very great importance, and, in consequence, we not only retired to the next room, but the Trinity Masters requested further time for consideration, and the case was therefore postponed for nearly a month. The result was this: on the 23d January, 1844, the court pronounced that the collision was the result of inevitable accident; and, in delivering my judgment, I said: "The opinion of the court is, that it might have been prudent for *The Itinerant* to have taken in her studding sails; but the court is also of opinion that the collision was not occasioned by the omission of *The Itinerant* so to do; that, considering that the conduct of *The Itinerant* might not have been in all respects strictly prudent, still, that as the damage did not arise from that imprudence, but from the state of the weather, she is not responsible."

Now, in that case, the fog was of the very densest character, so that the two vessels could not descry each other till they were almost in immediate contact; and although the gentlemen, by whom I was then assisted, were of opinion that *The Itinerant* was, in one sense of the word, to blame in carrying so great a press of sail, yet, looking at the whole case, they considered that the carrying such sail was not contributory to the collision, and, under these circumstances, I could not hold that vessel to blame. But let it not go forth, as by your

authority, that, whatever may be the circumstances of the case, a vessel is at liberty to carry a great press of sail to the imperilling the safety of other ships. That never was a doctrine laid down by this court or by your board.

In the present case, looking at all the circumstances and at the locality, considering whether it was a track in which * it was likely to meet other vessels, you will have the [*603] goodness to state to me presently whether you are of opinion that the carrying so large a press of sail was or was not contributory to this collision; whether, if less sail had been carried, more time would have been allowed after the discovery of the vessel to adopt those measures which ought to have been taken to avoid the collision. That will be the question so far as relates to the press of sail, if you think it of importance. The next point is this,—the wind is represented to have blown at the time from two different quarters. On the side of The Trident, it is alleged to have been N. N. E.; and on the other side N. N. W. But it does not strike me that that is a matter of very great importance; for it is admitted The Lord Saumarez had a free wind and the tide in her favor. Under these circumstances, she comes into a fog, and we will presume, for a moment, that there was a perfectly good look-out kept on board The Lord Saumarez. She discovers a light; of course it could not be at a great distance, because it could not be called a fog if the light was discernible a long way off. The precise distance no man can attempt to say; it would be at all times a matter of great difficulty to determine the exact distance of a vessel in a fog; but as to extracting the precise distance from this evidence, it would be a hopeless task. When, however, the light was discovered, what ought the The Lord Saumarez to have done? It is not denied that *prima facie* she ought, under the circumstances, to have ported her helm; but it is said that she had no occasion to do it in the first instance; she might have believed that this was a vessel at anchor, and, by porting her helm, she could not have escaped a vessel at anchor, inasmuch as the light was seen one point on her starboard bow. Now, it is for you to say whether this excuse has any probable foundation. I cannot say it is so likely that a vessel would be found at anchor in that locality, where such a multitude of vessels are passing that when you see a light you can conclude that it is a ship at anchor. You will have to determine that point from your knowledge of the subject; all I can say is, that it is of the * greatest importance that a general rule should be strictly [*604] observed, and a vessel should not be exempted from the general rule unless it is proved that there was adequate reason to

believe, that where a vessel was at anchor, by porting the helm, she could not avoid running into her. So much for the conduct of The Lord Saumarez. I do not think it necessary to enter into the question as to whether there was a good look-out or not; if I were to do so, I should be inclined to say, that I see no reason to suppose that The Lord Saumarez did not keep a sufficient look-out.

I now come to consider the question as to The Trident. The Trident, being a steamer, must of course be considered as a vessel always sailing free, though the wind and tide are against her. It is difficult to say what was the precise rate at which she was proceeding immediately before the accident; it is clear from the whole of the evidence that she was not going fast, and when she entered the fog, her former speed, whatever it may be, was moderated. It is said, that with regard to the measures adopted by The Trident, there is a great discrepancy in her evidence, and that it is hardly becoming in a party to come before the court and tell a tale, when their witnesses give accounts so entirely different one from another, and also from the plea. Let us see how that stands. It cannot be denied that the 4th article does not state the case at all clear; and, looking at the evidence, there is an abundance of discrepancy with respect to the distance of the two vessels from each other, the time which elapsed before the collision took place, the rate of sailing, whether the vessel was stationary, or whether she had head or stern-way. But who are the witnesses? They consist of two classes, the firemen below, and the parties on deck, and, having had diverse means of observation, there is every reason to expect a certain degree of discrepancy, and I should not have believed the story if I had found them all speaking in one uniform manner. But it is of no importance whether there was stern-way or not, if proper orders were given, and the measures were proper. It will be for you to say whether, under these circumstances, The Trident ought [*605] *not to have put her helm to port as she did, stop her engines, and reverse them if necessary.

Another point has been very ingeniously raised by the counsel for The Lord Saumarez. They say that the man on the fore-castle of The Trident not only saw that The Lord Saumarez was approaching, but that her helm was starboarded, and she was coming in a direction in which a collision was likely to take place, the helm of The Trident being ported; and he ought, they say, to have given notice to the master, and the master, seeing that the helm of the steamer was ported, and that of the brig starboarded, should have starboarded his helm, and so have escaped the collision. That argument does deserve the praise of very great ingenuity; but whether it

be sound or not, I must, after another observation, submit to your consideration. In the first place, the whole length of time before the collision took place was two or three minutes from the time the vessel was first seen; so that there was no long period for this change of measures. Secondly, is it consistent to a just regard to the rules of navigation, first to port the helm, and then all of a sudden, when the other vessel is coming down, to starboard it?

It is now for you to determine whether you think The Trident did right in the first instance, and whether you think it possible or probable, that having done right by porting her helm, in the short space of time that occurred, she could be fully aware that The Lord Saumarez was coming down with her helm starboarded, so as to avail herself of the opportunity to starboard her helm?

CAPTAIN ELLERBY. We are of opinion that there is no blame attributable to The Trident at all; that everything required on her part to be done was done, and that the primary cause of the collision was The Lord Saumarez putting her helm to starboard, contrary to the rules laid down by the Trinity House. At the same time I must make one observation: in the situation in which The Lord Saumarez was, it would have been much more prudent for her to have had no studding sails at all; and I think there is
* great praise due to the master of the steamer in acting as [* 606]
he did after the collision took place.

PER CURIAM. I must pronounce for the damage, with costs, and the cross action must follow this.

* THE SUPERIOR.

[* 607]

Cause, by Act on Petition.

January 12, 1849.

Collision. A vessel is not justified in departing from the rules of navigation, although it might have happened under extraordinary circumstances, that, by so doing, a collision would have been avoided. An exception to a general rule must be most satisfactorily proved.

THIS was an action by the owners of the brig Zior to recover the amount of damage sustained by her in a collision with the schooner

Superior, on the 28th of December, 1847, near Coalhouse Point, on the north side of the Thames. The brig, of 240 tons, from the Baltic, with a cargo for London, was proceeding up the river, the wind being about N. and by W. According to her statement, on rounding Coalhouse Point, being on the starboard tack, when nearly abreast of the Point, she saw two schooners coming down, the headmost of which kept her reach to the windward, and the hindmost (The Superior) was following directly in her wake, and when about three ship's lengths, or more, from The Zior, she put her helm a-port, to cross the hawse of The Zior, and being unable to do so, the collision took place, owing to the misconduct of The Superior, which should either have kept her course or put her helm to starboard. On the part of The Superior, a vessel of ninety-one tons, laden heavily with flints from Northfleet to Chester, it was stated that, on rounding the Point, a brig was observed to take the ground, and the man at the helm was ordered by the master to keep her away a little, when The Zior was discerned coming up the river under the lee of a light schooner sailing down, and The Superior's helm, which had been put to port, was put hard a-port; but the brig's helm being put hard a-starboard, the collision ensued; whereas, if she had kept her course, according to rule, it would not have happened.

[* 608] * The court was assisted by Trinity Masters.¹

Sir John Dodson, Q. A., and Bayford, Dr., for the brig; Robinson and R. Phillimore, Drs., for the schooner.

DR. LUSHINGTON, (addressing the Trinity Masters.) Gentlemen: The course I purpose to pursue on the present occasion, in order to bring clearly out the particular questions upon which the court is desirous of your judgment, will be this: to endeavor to ascertain, from the facts which admit of no dispute, what was, according to the general rule of navigation, the duty of each vessel to do; and then to see whether there are any particular circumstances proved which would justly form an exception as to either.

Now, there are some facts which are placed beyond all doubt. In the first place, it is admitted that The Superior ported her helm, and that The Zior starboarded hers; that The Zior, a vessel of 240 tons, was coming up the river with a flood-tide, and with the wind somewhere about N. and by W. (dividing it between the two statements);

¹ Captain Ellerby and Captain Farrer.

and that The Superior, going down the river, was at the time rounding Coalhouse Point.

The first question, as it appears to me, is this: whether The Zior had or had not the wind free. She was on the starboard tack, and The Superior on the larboard tack. According to my apprehension, it is clear, she must have had the wind free. I am not able to fix precisely the very point at which The Zior was at this time,—whether she had actually rounded Coalhouse Point or not; but it appears to me, that whether she had or had not, still she must have had the wind free coming up the river. With regard to The Superior, she was on the larboard tack, and you will have to decide whether she had the wind free or not. According to my mind, she clearly had, supposing she had not rounded the point. If so, and if it be clear that The Zior had the wind free, although she was on the starboard tack, yet she ought, according to ordinary rules, to have ported *her helm, whether The Superior had or [* 609] had not the wind free. Why did she not port her helm? We shall see whether there was any justifiable reason why The Zior did not port her helm.

The case, it appears to me, depends on two questions: first, the nature of the locality the vessels were in; and second, the circumstance of The Zior having met two schooners. With regard to the locality, it is not alleged on the part of The Zior that there was any danger of getting aground; and not only is it not alleged that there was any danger of getting aground, but whilst it was alleged, on the part of The Superior, that the master declared he had starboarded his helm for the purpose of avoiding getting aground, the statement is expressly negatived. Then it appears that there were two schooners coming down the river,—at what precise distance is disputed; it is alleged on one side that it was three ship's lengths, and on the other, six or seven. The only course we can adopt on these occasions, where there is conflicting evidence, is that of taking the medium. If there be any circumstances which throw a light upon it, then, of course, you will form your own opinion as to what was the actual distance. Is it a sufficient reason for The Zior starboarding her helm, that the first schooner kept her haul to the windward, and the brig had passed her safely by starboarding her helm, and not porting it? Is it said, on the part of The Zior, that it was impossible for her to have ported her helm, because there was not room to have passed between the two schooners. That involves another consideration, whether she ought not to have ported her helm on passing the first vessel. I mention this circumstance, because, if you once establish a general rule you cannot admit any exception from it,

unless it be most satisfactorily proved as a fact, and unless it be sufficient to take it out of the general rule. In the case of *The Gazelle*,¹ I said, that of course, there must be exceptions to the general rule; that is, there must be such exceptions as that [*610] no vessel is required to do an act which would • lead to her own certain destruction; no vessel is required to obey the general rule and go on shore; and other cases, which it is unnecessary to enumerate; precisely as in respect to the law of the road: the law of the road does not require that a carriage should be driven into an open drain.

Now, you will have to determine, first, whether your general rule applies to *The Zior*; whether, according to it, she ought to have ported her helm, as she did not; she manifestly starboarded it, and you will have to decide whether she was justified in so doing by the particular facts of this case. With regard to *The Superior*, the question will be simply this: ought she, according to the general rule, to have ported her helm? Supposing both vessels were free, I apprehend she was quite right in porting her helm. If she had been close-hauled, though on the larboard tack, I apprehend she ought to have kept her course, — at least that would have been best. She ported her helm. Was she wrong in so doing? Are there particular facts which justified her, and again form an exception to the general rule? If so, what are these particular facts? The only particular fact is this, that another schooner had, by pursuing a different course, — keeping close to the shore, — passed *The Zior* in safety. But I was struck by a remark of Dr. R. Phillimore, that, supposing the first schooner had committed an error with impunity, it was no justification for a second vessel to follow the same erroneous course. But the immediate point is this, — whether, looking at all the facts of the case, *The Zior* was justified in departing from the ordinary rule of keeping her course. That is a nice and delicate question, and, if you please, we will retire and consider both points, because cases of exception to a general rule always require the most deliberate consideration.

(After consultation.)

DR. LUSHINGTON. The gentlemen by whom the court is assisted are of opinion that *The Zior* is to blame in having starboarded her

¹ 2 W. Rob. 79.

helm. With regard to The Superior, they are of opinion that she did right in having ported her helm; * and although [* 611] it might have happened under extraordinary circumstances, that, had The Superior kept her course, this accident might have been avoided, yet, on the other hand, if she had kept her course, and The Zior had followed the general rule of navigation, and ported her helm, (which it was natural for The Superior to have expected she would do,) a collision would have taken place, and The Superior would have been to blame for not having followed the proper course, of porting her helm. It is not to be expected that any vessel, except under very peculiar circumstances, will violate the rules of the Trinity House, in expectation that thereby a collision would be avoided, and that another vessel would not pursue the rule that ought to be followed under the circumstances. Therefore, I pronounce against the claim of The Zior, with costs.

* THE JULIET ERSKINE.

[* 633]

Cause, Act on Petition.

January 23, 1849.

Collision during a dark night. The plea of inevitable accident on the part of the vessel which should have ported her helm, and did not, and which was proceeding at the rate of eight or nine miles an hour, — not sustained. What is "inevitable accident," considered.

THIS was a cause of damage, in which the owners of the schooner Rosebud, of ninety tons, sued the bark Juliet Erskine, of 297 tons, to recover the loss sustained by the schooner in a collision with the bark, off the coast of Spain, in the night of the 3d March, 1848. The main facts were not disputed. The bark was on the larboard tack, with the wind three points free; the schooner was on the starboard tack, close-hauled; the former was bound by the rules of navigation to have ported her helm, and it was admitted on the other side that she did so, but not in time to prevent the collision. It was replied, on the part of the bark, that the weather was so dark that the schooner was not seen until within a cable's length, and that the collision was the result of inevitable accident.

The court was assisted by Trinity Masters.¹

¹ Captain Probyn and Captain Bax.

Addams and Twiss, Drs., for The Rosebud, as to the [*634] law * of the case, where the plea of inevitable accident is set up, cited *The Virgil*,¹ and *The Mellona*.²

Bayford and R. Phillimore, Drs., for the bark.

DR. LUSHINGTON, (addressing the Trinity Masters.) Gentlemen: It is admitted that it was the duty of *The Juliet Erskine* to have ported her helm; it is also admitted that she did so, but that it was too late to prevent the collision. The question really is this: whether the delay in porting the helm is justified or not by the circumstances of the case.

On behalf of *The Juliet Erskine*, it is said that she kept a good look-out, and that she ported her helm as soon as the darkness of the night would permit her to discover the other vessel. The question then assumes this aspect: they say that this collision resulted from inevitable accident. Inevitable accident has been pleaded on many former occasions, and the definition I have given of it, and to which I must adhere, is this: where a collision takes place when every prudent measure, consistent with ordinary seamanship, has been adopted and carried into effect by the vessel proceeded against. Inevitable accident is not this: where a man proceeds carelessly on his voyage, and afterwards circumstances arise, and it is too late for him to do what is fit and proper to be done. If he can show to your satisfaction that he did every thing which an experienced mariner could do, adopting ordinary caution, but a collision nevertheless took place, of course he will be exonerated from all blame. It is said this is a case of inevitable accident arising from the darkness of the night. Let us consider how that stands. The night was either very dark, or it was not; if the night was not dark, I see no reason why *The Juliet Erskine* should not have seen *The Rosebud* in due time to have ported her helm, and thus have avoided the collision. But, assuming the night to have been as dark as stated, the question then is this: Was *The Juliet Erskine* justified in proceeding under the quantity of sail she carried at that time, and at the rate at which she was sailing?

[*635] * With regard to the cases cited in argument, what I have always said is this: I am not competent to say what is a proper quantity of sail and what is not; but I am competent to form this opinion; that if, on a dark night, the vessel is proceeding at

¹ 2 W. Rob. 201.

² 3 W. Rob. 7, 16.

such a rate that those on her deck have not sufficient command over her, so as to avoid all reasonable chance of accident, then that is too expeditious a rate to sail at, because it is the duty of those who navigate the commercial marine of the country to take care that they do not, for the sake of expedition, injure the property of other people. That was the case of *The Iron Duke*,¹ which was a most important case.

Now you will inform me whether or not,—assuming the night was dark as is stated,—the rate *The Juliet Erskine* was going at was improper. Observe, it is alleged to have been nine miles an hour; the other side say eight. Looking at the place where the collision occurred, do you think that *The Juliet Erskine* was sailing at such a rate as to necessarily place that vessel not sufficiently under command, so as to avoid all reasonable chance of accident?

CAPTAIN PROBYN. We quite agree with you, that the collision occurred in consequence of *The Juliet Erskine* not having ported her helm in sufficient time to clear the schooner; and if the night was so dark that a vessel could not be seen until you were nearly on board of her, the master of *The Juliet Erskine* ought to have shortened sail, and to have proceeded with more caution, more especially in a locality where he was likely to fall in with so many vessels.

PER CURIAM. I pronounce for the damage.

—◆—
* THE SARAH.

[* 677]

Motion.

March 9, 1849.

Salvage. Costs. Where the owners alleged the value of the ship to be 600*l.*, and the salvors, without requiring an affidavit, took out a commission of appraisement, which returned the value at 447*l.*, the court condemned the salvors in the costs of the commission. The regular course is to bring in an affidavit, but the first step on the part of the salvors is to demand one before taking out a commission.

In this case, an action in a cause of salvage was entered against the brig *Sarah* and her freight, in the sum of 350*l.*, and the ship was arrested. An appearance was given for her owners, who gave bail,

¹ 2 W. Rob. 377.

alleging the value of the brig to be 600*l.*, and their proctor prayed a *supersedeas* of the arrest; the proctor for the salvors objected to the value so alleged by the owners, and the court at his petition decreed a commission of appraisement. Upon the return of the commission, (under which the value of the ship was appraised at 447*l.*), the court decreed a *supersedeas* of the arrest, at the petition of the proctor for the owners, who, on the next court-day, tendered [* 678] * 50*l.* for the salvage services, together with such costs as were due by law, excepting the costs of the commission of appraisement. The proctor for the salvors declared his parties would accept the tender, but claimed the costs of the appraisement. On the part of the owners, the court was now moved to condemn the salvors in the costs occasioned by the commission of appraisement.

Harding, Dr., for the owners. The law is laid down in the case of *The Persian*.¹ Here a commission of appraisement was unnecessary, as we had overstated the value.

Addams, Dr., for the salvors. The value alleged by the owners rested simply upon the statement of their proctor, and the adverse proctor, not being satisfied, prayed a commission, to which the other proctor did not object; if he had objected, and offered to bring in an affidavit, then if the salvors had taken out a commission, they would have been liable for the expense. It was not incumbent upon us to submit to a mere allegation on the other side. According to the registrar, where there is an affidavit to the value, and a commission is taken out, which returns the value less than that stated in the affidavit, the parties taking it out bear the expense; but where the value rests upon a mere allegation, the costs fall upon the owners.

PER CURIAM. Is that so?

Registrar. No, I cannot say that. It is the usual practice to exhibit the affidavit first; there is nothing to bind the party unless it is exhibited. I was not aware of the case of *The Persian*.

DR. LUSHINGTON. There is no difficulty in the case. If the proctor states the value to be a given sum, and does not produce an affidavit in order to verify that statement, it is the business of the other party to ask for an affidavit. If the affidavit is not produced, a commission may be taken out, and the vessel appraised, and the court

¹ 1 Rob. jun. 327. 1 Notes of Cases, 304.

will give the costs. But what has been done here? The proctor, without an affidavit, alleges the value to be 600*l.*, and the other party immediately takes out the commission. Unquestionably, under these circumstances, I will not give the expenses of the appraisement. It is true, the regular course is, to bring in an affidavit; but you are not to cure its omission by immediately taking out a commission of appraisement; you are to cure it by demanding an affidavit, and, if that is refused, the remedy is then in your own hands; you take out the commission at the expense of the other parties. No objection was taken in this case to the want of an affidavit, but the commission was taken out, and the vessel, instead of producing 600*l.*, produces only 447*l.* Certainly I will not allow the expense of the commission.

(The salvors condemned in the costs of the commission of appraisement, and of this motion.)

SUPPLEMENT.

IN IRELAND.

* THE COSMOPOLITAN.

[* 17]

Cause, by Plea and Proof.

October 9, 1848.

Salvage. Case of derelict *de facto*, but not *de jure*. What is meant by abandonment *sine spe recuperandi*.

THIS ship, of 109 tons, with a cargo of rum, tobacco, iron, and other merchandise, on a voyage from Liverpool to Boney, in Africa, was found, on the 28th of August, 1848, about twenty-four miles off Lambay, abandoned by her master and crew, by three fishing smacks, together having fifteen hands, and brought into Kingstown. The owners followed their vessel without loss of time, but, not making any tender, the salvors filed their libel, alleging the value of the ship and cargo to be 5,800*l.* To this the owner pleaded a matter contrary and defensive, the main point raised being, that the ship was not derelict.

A commission of appraisement having issued by consent, the value of the ship and cargo returned was 2,293*l.* 17*s.* 4*d.*

The cause came on to be heard on pleadings and proofs.

Radcliffe, Dr., *Hayes*, Dr., and *Gibbon*, Dr., for the salvors, applied for a moiety, as for derelict.

Kelly, Dr., and *Gayer*, Dr., for the owners, resisted, relying on *The John and Jane*,¹ and *The Sarah Bell*,² and cases cited in the judgment of the court.

JUDGMENT.

DR. STOCK. The schooner *Cosmopolitan*, being the property of Messrs. Horsfall, of Liverpool, was boarded by the crews of three fishing smacks, belonging to Dartmouth, at eight or nine o'clock in the morning of Monday, the 28th of August last, somewhere about twenty-four or twenty-five miles off Lambay Island, to the east by north. The *Cosmopolitan* was, at this time, in a disabled state; her foremast down, and hanging overboard on the starboard side of the vessel, her bow stove in, her stanchions and bulwarks gone for [* 18] the space of fifteen feet, her bowsprit * started and jib-boom gone, her main-topmast had also fallen over, her foremast in three pieces over the bow, and hanging into the water. At the place where her bow had been laid open, the rent in the ship extended nearly to the water edge; but it appears, notwithstanding, that she was quite seaworthy, and was not making water at any dangerous rate of increase. Some of the crew of the fishing smacks proceeded to board *The Cosmopolitan*, and found in her two men and a boy; there was at the same time a ship hovering round *The Cosmopolitan*, whose name appears to have been *The Dora*, of Liverpool; and it is certain the two men and the boy found on board *The Cosmopolitan* were individuals belonging to the crew of *The Dora*, and must have been put on board *The Cosmopolitan*, under the orders of the master of *The Dora*, a very short time previous to the visit of the Dartmouth fishermen. Except these people from *The Dora*, there was no other living soul on board *The Cosmopolitan*, and these people were immediately hailed by the master of *The Dora*, and were ordered by him to quit the schooner. Obeying his directions, they took to their boat, shoved off, and *The Dora* immediately proceeded on her voyage, and disappeared.

Upon this state of facts, I think there is strong ground for the inference, that when *The Dora's* people first boarded *The Cosmopo-*

¹ 4 C. Rob. 216.

² 4 Notes of Cases, 144.

litan, the latter was in the situation of a derelict vessel, *de facto*, abandoned by her crew; and this conclusion is the more irresistible from the fact appearing, that the boat from The Dora had been actually seen by the promovents making for The Cosmopolitan, with the two men and the boy,—so short had been the interval of time between the arrival of The Dora's people and the arrival of the promovents, the Dartmouth fishermen, that there can scarce be a possibility for surmising, under the circumstances, that, at the period of The Dora's visit, there was any human soul on board The Cosmopolitan. It must, therefore, I think, be presumed, (for there is no immediate or direct testimony as to this,) that, when The Dora's people came up, the schooner was, *de facto*, in a derelict state. *Primâ facie*, therefore, and supposing The Cosmopolitan was then, not only * *de facto*, but *de jure* or legally, a derelict ship, a title vested in The Dora's people, as first finders, occupying the derelict, and then, the promovents, coming up as second salvors, would, if admitted by the first finders to a share of the salvage undertaking, have participated in all their rights as first finders. Now the case cannot, I think, be placed on a different ground by the circumstance of the first finders waiving their rights, and choosing to abandon, as well the profits as the labor, of further prosecuting the adventure. I conceive, therefore, that the promovents are now clothed, exclusively, with these rights as first finders, which they would have shared in common with the crew of The Dora, supposing that both parties had gone on to work the salvage out by their joint and united exertions. It results, therefore, that, *primâ facie*, this is a case of derelict in favor of the promovents, as finders and salvors of The Cosmopolitan. It lies on the owners, consequently, to displace this *primâ facie* case, if they can, by evidence of their own.

Now, as to the merits of the promovents in this case,—as to the degree of judgment, diligence, and alacrity with which they performed their task, and as to the fatigue and labor they underwent in the course of a passage of thirty hours and more to the harbor of Kingstown, against an adverse wind,—as to all these matters, they have been very properly, and with great truth, dwelt upon by the advocates for the promovents. I certainly admit the validity of these representations; and I think, if I am well-founded in the legal opinion I have formed on the main question in this case,—that is, the question whether or not this is to be deemed the case of a derelict ship,—and if I have not come to an erroneous conclusion on that point, then, I say, the sum I intend to award the promovents is a very liberal and large compensation for the services rendered, and

will sufficiently attest the sense the court entertains of the excellent conduct and highly meritorious and praiseworthy behavior of the promovents.

The defence in this case relied upon by the impugnants admits, to a considerable extent, a just cause of action in the promovents, and professes a readiness to make to them *equitable satisfaction, in part, for the claim set up in the libel. So far as relates to the salvage of the ship, the impugnants do not deny their liability, and have consented in court, during the progress of the hearing, to an award of 500*l.*, and their costs, to the promovents. I am of opinion that, in case the title of the promovents, as finders of a derelict, shall appear eventually not to be well founded in principle of law, then, that this offer of the impugnants is an extremely fair and handsome offer, and fully satisfies the other claims of the promovents, and ought to put an end to this suit.

Now the case in substance pleaded by the impugnants is this: that although, in point of fact, The Cosmopolitan was, when first boarded, in the morning of the 28th of August, in a situation of derelict, yet, upon considering the circumstances under which her owners and crew had lost possession of her some hours before, it results that she had never been abandoned by her people in such a way as to make her legally, or *de jure*, derelict, for that they did not abandon the vessel *animo derelinquendi*. In support of this allegation, the impugnants produced the master of The Cosmopolitan, Captain William Maxwell, who swore:—

“That he left Liverpool on the 25th of August last, and that, on the 27th, at four o'clock in the afternoon, he came in collision with an American ship, called The St. Lawrence. The Cosmopolitan and the St. Lawrence had left the Mersey, and had gone down channel in company together, pursuing nearly the same course. On Sunday, in the afternoon, they were off the Arklow bank; and at four o'clock P. M., Maxwell ordered the flying-jib to be hauled down, and while the men went out on the boom, making the jib fast, The St. Lawrence, (which is a ship of much larger dimensions and greater power than The Cosmopolitan,) hove in stays, and stood right against the schooner. The second mate told witness the ship was round; she was then a quarter of a mile from witness, as near as he can tell. Witness then put his helm hard up, to give way to The St. Lawrence, knowing that she could not go away from him, but, instead of putting his helm a-port, he put it a-starboard: he could have had the weather-gauge of witness if he had put his helm down. Witness hailed the American captain, and bid him put the helm a-port, but he persisted in keeping it a-starboard; and

* after that the collision took place. The St. Lawrence [* 21] struck the schooner on the starboard bow, about five feet from the foremast rigging, and carried away the foremast and jibboom, and cut down two or three stancheons. Witness told the crew he could not do any thing more for them, and bid them make the best of their way on board the ship. They did, all but one, who was drowned; he was on the jibboom. They climbed up by the bowsprit's shrouds. There were ten men, including witness, on board The Cosmopolitan. The captain of the American vessel refused to lend a boat to assist in saving the life of the seaman. When the ship cleared the schooner, witness asked the American captain for the use of his boat to get on board witness's vessel with witness's men, but he refused. Twenty minutes passed, after witness got on board The St. Lawrence, before the two vessels were clear of each other; it took that time to clear them. From the time witness got on board The St. Lawrence till he asked Captain Brown for his boat to return to The Cosmopolitan, was about half an hour; it was directly as soon as the schooner was cleared. Captain Brown answered that, 'he would do no such thing.' Witness's crew were all willing to go back with witness. Witness said to Brown, he would return him his boat in half an hour. Witness asked Brown three times for the use of his boat, but he cleared off from The Cosmopolitan and made sail to leave them in Holyhead or Liverpool. After they had sailed about two hours and a half, he hauled the ship on the wind, and said he would go to New York. Witness asked him what he was doing, and he said he would put them, (meaning the schooner's crew,) on board some such vessel as he might meet, or else leave them on some land. Witness said, if he did not go on with them, he, (witness,) would take the vessel from him, and take charge of her. When witness was asking to return to his vessel, she appeared to have more damage than he since found she had. When witness left, he was under the impression she was going down. The reason he was anxious to return to her was, that he then thought she was fit to carry him. Witness thought at first that the American ship would have gone right over them. Witness wanted to return to see if she was seaworthy, and if he could bring her into some port. Swears he was anxious to return to her, and that all his hands were anxious to save her if they could. Thinks he could have saved her, and would undertake now to bring her to Liverpool, though she has not been repaired. The mainsail was standing and set; every sail was in her, but the flying jib and maintopmast-staysail. She had no appearance of going down when witness wanted to return to * her. Swears that the refusal of Captain Brown [* 22]

to give him the boat to return to the schooner was positive and peremptory. (To the court.) At the time the collision took place, there was no time to deliberate, but to get on board The St. Lawrence. They had no communication as to whether it would be advisable or not to go on board. Witness thought The St. Lawrence would go over them, and desired the men to go on board, as he, (the witness,) could do no more. Swears positively he was detained by the American captain against his will, and was thereby alone prevented from returning on board The Cosmopolitan."

Now this is a state of facts shortly, and, I think, in the main, quite fairly deposed to by Captain Maxwell. As to which ship was in fault, upon this lamentable occasion, I neither pretend, nor do I think it material, to form any opinion. From what appears, I cannot pronounce a favorable opinion on the conduct of the American captain; but, at the same time, it would, I think, be highly unjust to condemn him unheard. Cases of collision involve often the nicest considerations of nautical science, and, not unfrequently, *prima facie* appearances are completely reversed upon a more diligent investigation of the merits of the case. Possibly, if Captain Brown, instead of making off on his voyage to America, had taken upon himself the character of salvager in this case, had taken The Cosmopolitan in tow, and brought her safely into Kingstown, he might, in a suit for salvage service in this court, have completely exculpated himself from all blame in the matter of the collision, and so have entitled himself to a salvage remuneration. I give no opinion on a point touching which I have the evidence only on one side.

Now, on this state of facts, the court is under the necessity of giving an opinion on the question of derelict or not derelict; and upon the best consideration I can give the subject, I have come to the conclusion, that neither in the sum, nor upon any part of these transactions does there arise a case of dereliction of this ship by her crew, such as to give a title to the promovents in this cause, as finders of derelict property, on the morning of the 28th of August, fourteen or fifteen hours after the period of the collision.

[* 23] * The original act of abandonment, when the crew climbed up the bowsprit shrouds of The Cosmopolitan, and took refuge on the deck of The St. Lawrence, appears to me to have been only an inchoate act of abandonment, not a final and complete abandonment, warranting the inference that it was an abandonment *sine spe recuperandi*. In the first place, the passing of the crew from The Cosmopolitan to The St. Lawrence was an act done under circumstances which manifestly precluded all rational deliberation. There was not a possibility of a choice between going and staying,

the appearance of danger, (though in fact unreal,) being such as to make the resolution of the crew plainly a consequence of the immediate instinct of self-preservation, without any room for reflection. Secondly, the passing of the crew from the one ship to the other did not for one moment interrupt or diminish their power of coöperating in, and contributing to, the preservation of the schooner, supposing that she should continue to float and not founder on the instant. Thirdly, the passing of the crew from the one ship to the other did not in anywise deprive them of the power of resuming the possession of the schooner, if, when disengaged, she was in a condition to be navigated. Now what the court is called on to do is, to decide that this is an abandonment *sine spe recuperandi*, having the effect of divesting, to a considerable extent, the right of property out of the owners. A case of derelict is certainly not forfeiture; but it is in the nature of forfeiture, and visits on owners a serious and strictly legal deprivation of rights. In point of natural, or I should say, philosophical, truth, the crew neither had, nor had they not, the *spes recuperandi*; there could be no question of hoping, or not hoping; for these are qualities of the rational faculty, and, under the circumstances, the men evidently were guided simply by the animal instinct of self-preservation. To attribute to them, therefore, a despair of recovering the possession of their ship, under the circumstances of this case, would at best be stating an artificial truth, (if true at all,) in contradiction to the fact. But ought this to be done, in justice, where the effect is to operate to a great extent in alienation of the *ownership? I think, in these cases, every fair [*24] intendment ought to be made in favor of the rights of property. Now, put the case, which might have turned out not a very remote one from probability; suppose that, when Captain Maxwell, finding the schooner floated, asked Captain Brown to lend him his boat, and proposed to resume possession of the vessel, Captain Brown had replied, "No, Sir; stay where you are; your ship is now a derelict; as such I will take possession of her, carry her into port, and demand a net moiety of the net proceeds of sale." Supposing Captain Brown blameless in the collision, he would have a right to hold this language, if the ship was then derelict; but this is a test under which the case can hardly stand examination. It would, in my opinion, be a monstrous perversion of the law to hold the rule in that degree of strictness; I therefore return to my position, and I say that the act of abandonment, as proved, was, in this stage of it, only an inchoate act of dereliction, not final and perfect, so as to annex to itself at once the legal consequences of abandonment *sine spe recuperandi*. I think that, notwithstanding the act of abandon-

ment in the first instance, there was a *locus penitentiae* yet remaining to the crew, and that they were at liberty to exercise a judgment immediately when the ships were cleared.

But there arises the second, and very material point, for consideration. There is no doubt, in my opinion, that immediately when the opportunity was given him, and at the first moment a judgment could be formed as to the practicability of navigating the schooner into a port, Captain Maxwell made his election, and became anxious to return to his ship. I am equally clear, that in this resolution, he had the cordial concurrence of his crew. He asked Captain Brown for the use of his boat to go aboard The Cosmopolitan with his men; he pressed the demand three times, — *instante*, *instantius*, and *instantissime*; but he met with a peremptory refusal. He and his crew were put into a state of constraint, and forcibly prevented from executing their intention of going back to their ship. From all I can collect, this part of the conduct of Captain Brown was most unjustifiable;

so as, in fact, to amount to a lawless imprisonment of the [* 25] persons of these * men, thrown upon his hospitality under circumstances of misfortune and distress. What would it have cost Captain Brown to have lent these men his boat for half an hour? What loss or inconvenience would he have sustained? None whatever, that I can see; and I can remark nothing in this procedure but a spirit of malevolence, and a wanton brutality which are not unimportant features of the evidence, when considering the nature of the restraint put upon the crew of The Cosmopolitan. In consequence of this state of things, which certainly, to all intents and purposes, amounted to an imprisonment of Captain Maxwell and his men, their intention was frustrated, and they remained on board The St. Lawrence, which sailed away in the direction of Liverpool. Thus, then, and in this manner, the *spes recuperandi* was lost; but the question is, whether an abandonment under such circumstances can constitute a case of dereliction. I do not see how it would be possible to distinguish this case, in principle, from others, in which the difficulty of applying the doctrine of derelict would be glaring in the extreme. Suppose a ship in distress near the land, and the crew go on shore for assistance, and there is no doubt whatever that they go for assistance only, *cum animo revertendi*, and they have by them their boats, and the means of return, but are forcibly prevented from so doing by a body of armed wreckers, or by the magistrates of the place, under false informations; would this be construed dereliction, in favor of salvors claiming a moiety, as in a case of abandonment *sine spe recuperandi*? I hardly think it would; and yet I cannot discover in principle any solid distinction between the supposed case and the present.

In the case of *The Sarah Bell*,¹ Dr. Lushington says, "By the *spes recuperandi*, in cases of derelict, is meant the hope and expectation entertained by the master and crew of returning to their vessel; not what was the precise state of things, but what was the intention by which they were actuated at the time." And in the case of *The Aquila*,² the doctrine is laid down in these terms: "It is not necessary, * (to constitute derelict,) that no owner [* 26] should afterwards appear; it is sufficient if there has been an abandonment at sea by the master and crew, without hope of recovery. A mere quitting the ship for the purpose of procuring assistance from the shore, or with the intention of returning to her again, is not an abandonment."

Now these authorities lay down the principle in the clearest manner; in every case the intention is traversable, and the issue is *quo animo* the act of quitting was done.

In *L'Espérance*,³ it was the case of a ship which, on her voyage from Dantzic to London, with a cargo of staves and deals, struck upon the Lemon and Ower Bank, and was there deserted by the master and crew. It was alleged, however, by the persons on whose behalf the property had been claimed, that they had received a letter from the master, advising them of his having left the ship, and that they immediately sent down proper persons to take charge of her and the cargo. So in *The Sarah Bell*, already referred to, which also was the case of a vessel abandoned by her master and crew, it was alleged, for the owners, that, "although the master and crew had left the vessel, it was not quitted *sine spe recuperandi*; that they were on the watch to regain their ship, and when they saw the vessel, next morning, floating off the sand, they rowed after her, but were too late."

In these cases, it is true, the defences set up proved failures on the evidence; but they establish in my mind this position: that whenever an act of abandonment of a vessel in distress at sea comes in question, a mixed question of law and fact arises for the court to determine; and thus the *quo animo* is, in all such cases, the material point, just as in criminal jurisprudence, the intention of the mind is the point inquirable in all cases, and governs the judgment of law as to the quality of the act imputed. What I determine in the present case is this: that the act of abandonment by the crew, in quitting their ship and taking refuge on board the American, is to be looked at, not by itself * alone, but in conjunction [* 27]

¹ 4 Notes of Cases, 146.² 1 C. Rob. 40.³ 1 Dod. 46.

with the determination they declared and the purpose they conceived at the first moment when they possessed a liberty of judgment, and recovered, if I may so say, the use of their deliberative faculties. That determination was in favor of a return to their vessel; but, at the very moment they recovered a state of moral liberty, they were placed under a condition of personal restraint.

I think it cannot be doubted but that, by the principles of our maritime law, no presumption ought to be made against the right of property in the owners, except such presumptions as are necessary implications from the facts. See how the very fountain of our code of marine jurisprudence, the laws of Oleron, treat the subject. By the 32d article of King Richard's code, which, we know, was adopted and received as law by all the western nations of Europe, from the Straits of Gibraltar to the Sound, it was enacted: "If, by reason of tempestuous weather, it be thought expedient for the lightening of any ship or vessel at sea, or riding at anchor in any road, to cast part of the lading overboard, and it be so done accordingly for the preservation of themselves; know, that the goods so ejected and cast overboard do become his that can first possess himself thereof, and carry them away. Nevertheless, it is here to be further known and understood, that this holds true only in such case as when the master, merchant, and mariners have so ejected and cast out the said goods as that withal they quit all hope and desire of ever recovering them again, and so leave them as derelict, or as things utterly lost and forsaken, without ever making pursuit or inquiry after them; in which case only the first occupant becomes the lawful proprietor thereof." And article 33: "If a ship or other vessel hath cast overboard several goods or merchandise, which are in chests, well locked or made fast, or books, so well secured and so well conditioned that they may not be damaged by salt water; in such cases, it is to be presumed, that they who did cast such goods overboard, do still retain an intention, hope, and desire of recovering the same: for which reason, such as shall happen to find such things, are obliged to make restitution thereof to him who shall make

[* 28] a due inquiry or pursuit after them; or at least to employ them in charitable uses, according to a good conscience."

Now this was the law of England 750 years ago, the period of time at which King Richard the First published the law of the sea in the island of Oleron, and it is the law of the land to this hour. The sections of this code, 32 and 33, which I have quoted, establish the principle, as it appears to me, that, in questions of derelict, presumptions are not to be made against the rights of property in the owners. Now, is not the court, in this case, called upon to make a

presumption against the right of property in the owners, when it is called on to pronounce that the act of quitting The Cosmopolitan, on this occasion, implies, upon the part of her crew, the intention of not returning? Naturally speaking, they had not in their minds any intention whatever, except to save their lives; and this was not a rational, but a mechanical movement; it does not imply, I think, the existence of a feeling which can be described as a despair of returning.

I come now to consider the authorities and cases which have been called out in the course of the argument by the learning and ingenuity of counsel, particularly those special cases which have arisen under the prize salvage acts. The scope of these acts was to limit the amount of salvage payable to the crews of the king's ships, and in cases of recapture of British vessels and cargoes by mariners in his Majesty's service and employ, and on board his Majesty's ships. Formerly, the right of recaptors, in the quality of salvagers, was unlimited, and the salvage awarded was generally in practice exorbitant; but, by a series of acts of parliament, the discretionary power of the Court of Admiralty in such cases was taken away or abridged, and the amount of prize salvage on recapture was limited to one eighth of the value. The cases which are reported on the subject, therefore, and which have been quoted by counsel in the course of the argument, do not, of necessity, involve more than one question, namely, whether those cases came under the operation of the prize salvage acts, so as to restrain the court from giving more than one eighth, or whether the *court could [* 29] not hold them as cases of general salvage, triable properly in the Instance Court of Admiralty, and consequently give a larger allotment of salvage than the war salvage paid at one eighth.

However, in the important case of *The John and Jane*,¹ cited by Dr. Kelly, the question was expressly raised, whether, in the case of an English ship found at sea abandoned, have been taken by the enemy and deserted by the captors, this was to be considered as a case, properly speaking, of a derelict; and Lord Stowell, (then presiding in the court under the title of Sir William Scott,) did judicially decide the question in the negative, because, in such case, there could not exist, on the part of the owners and their agents, the master and crew, the *animus derelinquendi*. A great effect was produced in court by the discovery, made by Dr. Gibbon, of other cases subsequently decided, and which are alleged to have overturned the

¹ 4 C. Rob. 216.

decision of that great judge in the case of *The John and Jane*. I thought myself, at first, though with doubt, that these authorities did bear this complexion; but, upon reading them, I find it is the very contrary, and that they do actually proceed upon the recognition of the authority of *The John and Jane*, and so far from reversing this judgment, in effect, establish and confirm it.

The case of *The John and Jane* is the case of an English ship found at sea, having been taken by the enemy and deserted by the captors. It was urged on the court that it was a case of derelict, and that a moiety should be given; but the court said: "I do not think that this is to be taken as a case of derelict. The vessel appears to have been captured by the French, and deserted; but there is no *animus derelinquendi* imputable to the owner. The French captors had left the vessel because, perhaps, they did not wish to be encumbered with her, or delayed in their cruise; but those who were in possession, as the agents of the proprietor, had

not committed any act of dereliction: the principle of derelict [* 30] dict does not, in my opinion, apply. I shall give *150L

(being one fourth,) though, perhaps, that will be going farther than may, on strict principles, be warranted. This case was decided the 26th of February, 1802. The next case is *The Gage*,¹ and was decided April 16th, 1806. This was a question on the recovery of a British vessel, with a cargo of timber, which had been captured by a French privateer, but was found abandoned at sea, with a fire burning in her, by *The Kite* sloop; and it was argued that it was not merely the case of salvage on recapture, but that it approached rather to the nature of derelict, as the vessel was abandoned, and in danger of perishing by fire as well as water; and the court was asked to grant a larger amount of salvage, as it considered itself at liberty to do in *The John and Jane*, and not restrict itself by the Prize Act; and the court ultimately, as in the case referred to, allowed one fourth salvage. Now it appears clear that this case was not only argued, but determined, upon the authority of *The John and Jane*. So, also, the case of the *Lambton*,² where the ship was found, without any person on board, by his Majesty's ship *Resistance*, and one fourth salvage decreed; and this case was decided 29th October, 1807. The next case, in which the same principle appears to have been adhered to, is that of *The Blendenhade*,³ decided 20th May, 1814, in which less than one tenth was given as salvage; and then follows, in point of date, — namely, June 13th.

¹ 6 C. Rob. 273.

² Ibid. 275, n.

³ 1 Dod. 414.

1815, — the case of *Elliotta*.¹ This was the case of a British ship with cargo, which was discovered by his Majesty's sloop *Philomel*, lying near the shore, about two leagues to the westward of the port of *Almazanen*, in Spain, having drifted on shore without a living creature on board. It appeared that she had been captured off *Alicant* by a French privateer, and afterwards deserted, and the court, (Sir William Scott,) held that this was not a case of derelict, but that it was as nearly so as possible; and, because the facts of the case contained every degree of merit that could possibly arise in a salvage service, * awarded the salvors a moiety of [* 31] the property. All these cases, — from *The John and Jane*, in 1802, to this, (the last referred to,) *The Elliotta*, in 1815, — move in one direction.

The last case I have to refer to is *The Lord Nelson*.² This appears to me to be an authority not in the smallest degree conflicting with the judgment in the case of *The John and Jane*. The case of *The Lord Nelson* is this: — The English ship had been captured by a French privateer, was afterwards deserted by the enemy, was found without any person on board, and brought in by *The Cherokee* sloop-of-war; and the question, therefore, was, whether it was merely salvage on recapture, or as a derelict; and the court, (Sir William Scott,) recapitulating the facts of the case, held, that there was "a total abandonment of their right as captors, not under the terror of any British force; that there was a total extinction of the rights of the first captor, who had quitted the prize upon finding he could not carry her into port, and having at the same time another object in view better worth his attention; that there was no application of force or terror; that it was a voluntary quitting, and that the ship was therefore found in the situation of a derelict, abandoned by all who could pretend any right to her." The amount of salvage awarded was a moiety, and is at once accounted for by the circumstance that the recaptured vessel was a king's ship. No private owner appeared; no rights of private property were put in question. The ship salvaged was a transport ship, the property of the government, and in the service of the crown. Now, in the case of a ship being the king's property, no case of derelict can ever properly arise, for when such ship becomes derelict, the property vests in the king, as a droit of his crown; and then the king is at once remitted to his former and better title, as owner; but to balance this, the king is obliged to pay larger and more liberal salvage than a subject would:

1 2 Dod. 75.

2 Edw. 79.

for the king is the general protector of the trade and navigation of the subject, and it is his interest, as sovereign, to [*32] *encourage the generous exertions of salvagers in the preservation of life and property, and for the benefit of his royal revenue of customs; and, therefore, the king, in his own case, sets an example of liberality to his subjects, in the proportion of salvage he pays. And this is clearly the reason why, in the case of *The Lord Nelson*, the court thought itself warranted in giving a moiety, which it would equally have done if it had been treated confessedly as a mere case of ordinary salvage. That the king pays more than a subject, *ceteris paribus*, is an elementary doctrine of these courts. In *L'Espérance*,¹ the court states that "in no instance, except where the crown alone has been concerned, and where no claim has been given for a private owner, has more than one half been decreed by way of salvage." And again, in *The Britannia*,² the court says: "I do not know a case, except for salvage to a king's ship, or the property small, where the court has exceeded a moiety."

If the whole of the proceeds of sale had been awarded in the case of *The Lord Nelson*, I should still have considered it wholly inoperative as an authority to shake the decision in *The John and Jane*. The judgment of Sir William Scott, in that case, I look upon as being now law, and in nowise shaken by any subsequent cases. This, therefore is, undoubtedly, an authority coming powerfully in aid of the view the court is induced to take of the present case. But I decide this case, I avow, on general principle, — on the principle of *The Aquila*. My impression is that, up to the moment when the American captain placed the schooner's people in a state of restraint, and, I would say, captivity, — up to that moment they are not to be held to have quitted the possession of their ship *sine spe recuperandi*; and, as to what happened while the men were in a state of duress, I look upon it as null and void. I think, therefore, there never was, in this case, legally speaking, an abandonment *sine spe recuperandi*.

But although the case is not, in my opinion, a case of a derelict, in the strict sense of the word, yet I regard it as a case [*33] *approaching derelict, and I think that the salvage ought to be larger than if the ship had never been left by her crew. Certainly, the salvors have considerable merits to plead, and I should be disposed to go close upon a fourth of the value, in estimating what is due to their services. I shall do nearly what was done in

¹ 1 Dod. 49.² 3 Hagg. Ad. R. 154.

the cases of *The Gage* and *The Lambton*, adopting these cases as precedents for my present decision. There is in this case some consideration to be had of the actual damages sustained by the boats, and loss of time to the men, in the best period of the fishing season.

The award the court makes, then, will be, first, 30*l.*, to indemnify for the damages and demurrage, and 500*l.*, together with their costs and expenses, to the salvagers, being 530*l.*, on the whole, for the salvage. Of this sum of 530*l.*, 30*l.* will be paid to the owners of the boats which have incurred damage and been put to the expense of repairs, in proportion of their actual expenditure in repairs, and for demurrage. Of the 500*l.*, I allot 60*l.* to the boat-owners, as salvage due on account of the use of their boats, two thirds thereof to be paid to Edwards, the proprietor of two smacks, and the one third to Knight, the proprietor of the remaining smack. To the four boys I allow 18*l.* each, and the residue of the 500*l.* is to be distributed equally between the nine men salvagers, which will allow them each about 40*l.*¹

* THE CATHERINE.

[* 43]

Protest.

June 23, 1848.

A vessel, having been wrecked, was sold, as sunk, and the purchaser, in order to raise her, employed a patented apparatus, belonging to a salvage company, by a verbal agreement with one G. N., and the first attempt failing, he made an agreement in writing with another person, E. A., for a further attempt with the same apparatus, which likewise failed; and another agreement, in writing, was made between the purchaser and G. N., for a third attempt, which succeeded; the salvage company, the owners of the apparatus, sued for salvage, disavowing the agreements, as unauthorized by them; the owners appeared under protest, alleging that the services were not of the nature of salvage, but had been rendered under a contract made on land, over which this court had no jurisdiction.

Held, overruling the protest, that the service being in its nature of a salvage character, the jurisdiction of this court over the subject-matter was not ousted by a mere averment of a binding agreement on land; that the court must try the question whether there was an agreement or not, and if there was, it has jurisdiction over the money brought in under an agreement pleaded in bar.

THIS was an action by Edward Austin and the crew of the steam-

¹ The Editor is indebted for this Report to the kindness of Dr. Kelly.

vessel Powerful, to recover a reward for salvage services alleged to have been rendered to the brig Catherine; to which action the owners appeared under protest to the jurisdiction of this court. In their act, in support of their protest, they alleged:—

“That on the 7th February, 1848, the brig, with its cargo of coals, which had been sunk on the Nore Sand, was put up for sale, (as lying sunk,) by auction, at Sheerness, and purchased by Mr. J. U. Heygate, on behalf of himself and others, for 110*l.*; that, soon after the purchase, application was made to Mr. Heygate by a person named George Neale, as superintendent of a company called Austin's Patent Ship-Raising Company, to employ their apparatus for raising the wreck; that, on the 9th February, as Mr. Heygate was proceeding to London, he met the steamboat Powerful, in command of which Neale then was, who requested Heygate to meet him at Sheerness, which he did, when Neale again stated he was the superintendent of the said company, and offered the use of the said apparatus for 11*l.* per day, and it was verbally agreed that the apparatus should be engaged for two days at that rate; that on the 11th February, Neale, with the men under his orders, proceeded to the wreck, with the apparatus on board The Powerful; but the attempts to raise the brig on that and the following day were without success; that Neale then persuaded Heygate to go to London and see the company in order to make further arrangements with them, and accordingly, on the 14th, Heygate accompanied Neale to the office of Mr. T. E. Wyche, in London, whom he represented to be the solicitor of the company, where they were joined by a person named Ruck, (who was represented to be connected with the company,) and Edward Austin, (the patentee of the apparatus,) the former of whom offered, on the part of the company, to make further attempts to raise the brig, but Heygate declined the terms, and left the office; that Neale ran after him and pressed him to allow a further attempt, offering, on behalf of the company, the use of the apparatus for two days more for 50*l.*, and Heygate thereupon returned, and,

[*44] stating * to Wyche, Ruck, and Austin, the terms proposed by Neale, said he would agree to them provided the company would guarantee sufficient lifting power; that the terms being assented to, an agreement was prepared by Mr. Ruck, and subsequently executed by Austin and Heygate, to the following effect: ‘Mr. J. U. Heygate agrees with Mr. Ed. Austin to engage the services of the men and the use of the apparatus for raising vessels, known as “Austin's Patent,” for two days, for the sum of 25*l.* per day; but if Mr. Heygate succeeds in raising the vessel called The Catherine in one day, he is then only to pay the sum of 38*l.* This

agreement is made independently of the sum of 22*l.* already due for the services of the men and the use of the apparatus on the 11th and 12th February. Mr. Ed. Austin undertakes that there shall be sufficient power to raise The Catherine, with her cargo that may be in her. The money to be paid to Mr. Ed. Austin at the expiration of the two days, the first day being Wednesday, the 16th of February. Dated February, 14, 1848.' The act further alleged that the operations were not commenced until the 20th, and after several attempts, the apparatus was found to be totally inadequate, and on the 23d, Heygate represented to Austin and Neale, at Sheerness, that the agreement had not been fulfilled, when they urged him to make a further agreement, and Neale proposed to undertake the laying the wreck on Grain Spit, or on the top of the sand, for 150*l.*, but Heygate refused to give more than 100*l.*, to include all that was payable under the previous agreement; that Austin and Neale requested him to wait until the latter had proceeded to London and consulted the company on this proposed arrangement, which he consented to do; that on the 28th, Heygate again met Neale at Sheerness, who stated that he had seen Mr. Wyche, and was now ready to enter into the agreement proposed; that an agreement was immediately drawn up, and signed by Heygate and Neale, to the following effect: 'February 28th, 1848. Memorandum of an agreement between Mr. J. U. Heygate and Mr. George Neale, (on behalf of the Patent Ship-Raising Company,) for the raising the wreck Catherine, now on the Nore Sand. The said George Neale agrees to raise the said wreck and to convey her on to Grain Spit, or higher up on the Nore Sand, as shall be deemed best by Mr. J. U. Heygate. The wreck is to be moved, as aforementioned, before the expiration of the next spring tides, or this agreement is void. For the above-mentioned services Mr. G. Neale charges the sum of 100*l.*, which sum includes the 22*l.* he has already earned at the said brig, and Mr. J. U. Heygate agrees to pay such charge of 100*l.* on completion of the above-mentioned work.' The act further alleged, that on the 8th March, attempts were again made to *raise [*45] the wreck by the apparatus, and on the following day it was raised and conveyed two hundred yards further to the westward on the sand, and the owners had since employed other parties to remove it to Southend; that Mr. Austin, who came to Sheerness on the 8th March, and remained there the 9th, watching the whole operations, was fully aware of the last agreement and its terms, and had admitted that he had forwarded it on the 8th to Mr. Wyche; that the pretended salvors were employed by the Patent Ship-Raising Company, or their agent duly authorized by them, and that the

services they performed were not of the nature of salvage services, but were rendered solely in virtue of the contracts or agreements before set forth; wherefore they have no remedy in this court."

The answer on the part of the salvors alleged:—

"That, in February, Austin was engaged by Heygate to raise the wreck with his patented apparatus, consisting of air-tight flexible cases, which service he performed, and placed the vessel and her cargo in safety; that Neale was never employed by the Universal Salvage Company, called Austin's Patent Ship-Raising Company; that, in order to test the practicability of the invention, under the immediate management of Austin, the patentee, the directors of the company had granted him the use of their apparatus for raising any ship he pleased; that Messrs. Ruck and Wyche, and another shareholder in the company, then went to considerable expense on their own account, in having the apparatus made fit for use, and Neale, who is a chain lighterman, accustomed to place chains round sunken vessels, was engaged by Austin to superintend in that department of the work, on the understanding that he was to receive out of the salvage-money a sum according to his merits; that, after the sale of the wreck to Heygate, Neale was employed by Austin and the said shareholders, (who hired the steamer *Powerful*,) to take the command of the men hired to perform the chain-work, the whole operation being placed under the management of Austin, who, being ill for a time, was obliged to remain on shore, and, on the 9th February, he found that Neale had, without authority, entered into a verbal arrangement with Heygate, whereupon Ruck wrote to Neale, reprehending him for having so done, and stating that he had no authority to make any such arrangement; that when Heygate saw Ruck at Wyche's office, after much discussion, he entered into the agreement of the 14th February, with Austin, when both Ruck and Wyche stated distinctly to Heygate that Neale had no authority to enter any agreement whatever, and neither they nor Austin represented the company, nor held out to Heygate that they did so, but [* 46] on the contrary, informed him that the apparatus was lent to Austin, who was for the time the proprietor; that Mr. Wyche did not, on the occasion, act, nor assert that he acted, as attorney to the company, but said he assisted with his own funds to carry out the enterprise, which, if successful, would make the company's patent profitable, of which he was a shareholder; that neither Wyche, Ruck, nor Austin ever authorized Neale, (who is an illiterate person,) to enter into the alleged agreement of the 28th February, (which is in the handwriting of Heygate,) or any other, of which Heygate was aware, and neither he nor Neale ever communicated

the contents of that agreement to Austin, who knew nothing of it until the 8th March, when it was handed to him by Neale, and he immediately forwarded it to Wyche, who, with the concurrence of Ruck, wrote to Heygate a letter, denying the authority of Neale to enter into any agreement, which letter Austin and Ruck presented to Heygate at Southend, saying they should expect the usual salvage, or 300*l*.

Sir J. Dodson, Q. A., for the owners, in support of the protest.

This is a written contract, made on shore, *infra corpus comitatús*, and by the 13 Ric. II. c. 5, and the 15 Ric. II. c. 3, the Court of the Admiral is declared to have no manner of cognizance of any contract, or of any thing, done within the body of any county, either by land or by water.¹ In regard to seamen's wages, where the contracts are made on land, an action can only be brought upon the ship's articles, and if there is any thing special in the contract, this court cannot deal with it. *The Sydney Cove*.² *The Riby Grove*.³ *Howe v. Nappier*.⁴

PER CURIAM. Must you not show there is a contract first? If there is, the contract is a bar.

We set up the contract in the protest, and if the two parties had due authority, it is a binding contract, and would be upheld by this court. We at first thought we were dealing with the company, but but we are now satisfied that Austin was the person who contracted by Neale, his agent in the matter. The second agreement is signed by Austin himself, and refers to the previous agreement; thus recognizing Neale as a person authorized to enter into the contract.

Bayford, Dr., on the same side.

Jenner, Dr., for the salvors.

It is objected that the court *has no jurisdiction, be- [*47] cause here is a contract made on land; but the statute 3 & 4 Vict. c. 65, s. 6, gives the court authority to allot salvage within the body of a county, and the reasonable construction of the

¹ Bl. Comm. b. 3, c. 7.

² 2 Dod. 12.—

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³ 2 Notes of Cases, 205; 2 Rob. jun. 52.

⁴ 4 Burr. 1944.

section is, that it gives jurisdiction to enforce agreements. In the *Christina*,¹ the court took cognizance of an agreement respecting towage.

PER CURIAM. Is the Nore Sand within the body of a country?

If not, then I cannot understand why the court has not jurisdiction over this agreement, as in the case of *The True Blue*.²

DR. LUSHINGTON. There are some peculiar circumstances in this case, which, on the day when it was first argued, rather induced me to think it would be necessary to take time before I pronounced my judgment; but I have since then directed my consideration to the whole facts, and to the law which bears upon the case.

It is requisite, in the first instance, to state what is the only question which the court has to decide, and which it must take from the proceedings in the cause; and if those proceedings have assumed an inconvenient shape, the court may lament it, but cannot alter the state of things contained in the pleadings.

The action, it must never be forgotten, is commenced in the name of Edward Austin and sixteen other persons, composing the crew of the steam-vessel *Powerful*, against this vessel, *in rem*, in a cause of salvage, civil and maritime. In the appearance given on behalf of the owners, they set forth in their act various matters which occurred relative to the service said to have been performed to the ship and cargo, and they allege an agreement with Mr. Austin, binding himself and the crew, who, they conclude, "by reason of the premises, have no remedy in this court for salvage remuneration against the brig, her cargo, or freight." This has been argued as a case in which this court has no jurisdiction to decide upon the merits of the case, and when the whole circumstances were to be considered; and that may or may not be the fact; but undoubtedly this is not a very convenient mode of raising the question. However, what

[* 48] * is the answer made to this? It is, that the parties have a remedy in this court for salvage, and they pray the judge to overrule the protest. Then all the court can do, in this state of the pleadings, is, to determine whether the parties have properly appeared under protest; or, in other words, whether the court has or has not original jurisdiction over the subject-matter: if it has, the

¹ *Antea*, 4.

² 2 Notes of Cases, 413; 2 Rob., jun. 176.

protest to the jurisdiction must be overruled, even if the facts should preclude the court from exercising the jurisdiction.

It is not necessary to consider minutely the circumstances from which the services originated. It appears that this vessel had been wrecked, and when beneath the water she was purchased by Mr. Heygate and other parties. Some weeks after, (whether in virtue of an agreement or not I do not at present say,) the vessel was raised, and ultimately brought to a place of safety.

Now, I apprehend, the first consideration for the court to determine is, whether this be or be not, in its proper nature, a salvage service; in other words, supposing the agreement not to be binding on the parties in this cause, would this be a salvage service. Certainly, it is a peculiar case, for I do not recollect any case resembling it in this particular,—namely, that the original owners have sold and parted with their interest in a vessel so circumstanced, and that the question arose out of proceedings against others who derived under the sale. Nor do I recollect any case precisely resembling it in another respect,—namely, where the vessel had lain for any length of time under water, and was so when the contract (if contract there were) was made. But the question is, whether these circumstances create a real and true distinction; because, if they do not create a real distinction in the subject-matter, though there may be differences, of trifling differences the court can take no cognizance. No one doubts that, if a vessel is sunk on any of the coasts of this country, or in any of the rivers of this country, and a service is performed to her, which rescues her from destruction, it is a salvage service. Is it possible to say, because the owners have happened to part with their interest in the vessel, that it has ceased to be a salvage service? This constantly occurs, in fact, though not openly, where the court has ordinary jurisdiction; because, when a vessel is sunk, [* 49] the owners may abandon her, and the insurers then are the only parties interested in her, and it is no matter whether the vessel has been sunk for a shorter or a longer time. Could the court say, that, where a vessel has been raised within three or four days, the parties should be entitled to be considered salvors, and if it be not raised until the end of some weeks, they should not be so considered? There may be differences, but there is no distinction. For these reasons, I am of opinion that the case was originally properly described as a case of salvage, civil and maritime, and that the court has jurisdiction over the subject-matter itself.

The next question is, whether the court is, by any of the circumstances alleged, ousted of such its original jurisdiction. The circumstances stated are these: that there was an agreement binding

on the parties, and that that agreement was made on land. Taking the facts to be so, the question is, whether the court would be ousted of its jurisdiction? In the first place, I apprehend that I must try the question whether there was an agreement or not, for it is quite impossible, where a court has original jurisdiction, that it can be ousted of it by a mere averment of this kind. The true rule is this: that wherever a subject-matter belongs to the jurisdiction of a court, all questions which arise immediately out of it are to be tried by that court. In the celebrated case of *Mereton v. Gibbons*,¹ it was laid down that, where the subject-matter belongs to the jurisdiction of this court, all matters incidental thereto are to be tried by this court. But it may be said that this court cannot do so in the present case, as it has not the means of proceeding to a satisfactory adjudication upon it. This might have been said before the statute² passed, when there were questions in law and equity which this court had not adequate means of trying; but it was for the very purpose of giving the court the means of coming to a satisfactory conclusion in such cases that two great powers were conferred upon it by the statute;

it has the power of directing an issue to a court of com-
 [* 50] mon law, to determine the validity of an *instrument; and
 if that is not necessary, it has the power of calling before it any witness the court may think fit, and examine such witness, in order to ascertain the truth. On neither of these grounds is it possible to say that the jurisdiction of the court is ousted.

These are transactions of frequent occurrence; questions of agreement have arisen time out of mind in this court,—agreements made at sea and on land, in writing and verbal. In the case of the employment of a steamer, can it make any substantial difference whether, if an agreement is made with the steamer, the steamer happened to be on the high seas or in Margate Roads, the master being on shore?—will that circumstance have the effect of destroying the jurisdiction of this court? If this would work the effect of taking away the jurisdiction of the court, it would be taken away by a circumstance perfectly immaterial to all the merits of the case, and irrelevant to them. I am clearly of opinion, therefore, first, that I must try the question whether there has been any agreement or not. But there is another question involved in it, which was indirectly alluded to by Dr. Jenner. Supposing there has been an agreement for rendering salvage services, and the court has determined that it is a good and valid agreement, is the court ousted of its jurisdiction

¹ 3 T. R. 267.

² 3 & 4 Vict. c. 65.

afterwards? Or, which is infinitely more important, are the salvors ousted of their lien upon the ship, cargo, and freight, because they have entered into an agreement on land, and are they compelled to have recourse to none but a personal action to recover the amount? I apprehend, quite the contrary; because, when a salvage service is performed, and the owners say to the salvors, "You shall not go beyond the agreement by which you bound yourselves to perform the service for a specified sum," they are bound to pay that money into court, and the court will direct the money to be paid out in conformity with the agreement.

I have referred to the case of *The Mulgrave*.¹ That was a cause of salvage brought by the owner of a fishing-smack, navigated by seven persons, which, when off Harwich, was hailed by *The Mulgrave*, and the master and three of the navigators, agreed for 60*l.* to render their assistance to the vessel; they did so, and she [* 51] was brought safely to Gravesend. The value of the ship and cargo was 10,000*l.*, and the owner of the smack suggested a loss on his cargo of fish of 26*l.*, for the recovery of which he, — the owner, be it observed, — entered the action; 60*l.* was brought in, and it was contended that this was not a salvage case, but that the whole was a matter of agreement. Now, Lord Stowell, having mentioned the circumstances, and having observed that it was a hard bargain for the smack, as, if such a vessel were detained, "it would bring the fish to a bad market," said: "An agreement was made with the vessel in distress, and it was made by a negotiation, which received its accomplishment by a performance of service. It is said the owner of the smack must have suffered some injury by the detention of the vessel; and, perhaps, the court would have considered his claim, if the present case had been a case of salvage; but it is one of contract, and I cannot entertain the question: were I, however, owner of a vessel of this magnitude, I should make no hesitation in acceding to the demand." And he pronounced against the action. Now I have read the words of this judgment in order that the real result of that case may be distinctly understood. In the first place, there was no appearance under protest; no one attempted to deny the jurisdiction of the court by reason of there being an agreement, and a valid agreement, and as I said, whether the agreement was made at sea or on shore, in my opinion, made no difference; but the jurisdiction of the court is acceded to; the money is brought in, and the agreement is pleaded in bar of the action. "It is a case of contract," Lord Stowell said, "and I cannot entertain

¹ 2 Hagg. Ad. R. 78.

the question." If the parties suppose that Lord Stowell, by using these words, meant to hold that he had no jurisdiction, I hope they will disabuse their minds of such an error. In that case the owner sued alone; the master, as the agent of the owner, had authority to bind him by a contract, and Lord Stowell said it was a case of contract, and he could not, therefore, regard it as a case of salvage. It is true that there may appear, at first sight, to be some ambiguity in the form of expression, "If the present had been a case of salvage;"

but the real meaning is this: the court is precluded by [* 52] * the agreement from adjudicating upon the real merits of the case,—which, without such agreement, it must have done.

Now, these being the circumstances of the case, I will state the result at which I must necessarily arrive by following up the reasoning. I must of necessity overrule the protest, and assign the parties to appear absolutely. But although it is my duty to do so, I cannot even enter into the facts, as to whether this is a valid agreement or not, because if it is to be considered a valid agreement, according to the practice of the court, the money must be brought in and the agreement pleaded in bar, not by the way of protest. If I am to try, first, whether this was an agreement made by a person with due and just authority, and secondly, whether it be void for the reason alleged by Dr. Jenner, in order to ascertain the truth, I may find myself under the necessity of directing an issue, or of calling witnesses before me. And one very serious question will arise as to the due execution of the instrument; a question of agency, not easily solved. It is not pretended that Neale was clothed with any formal authority as agent, but that, according to the facts and the *res gesta*, he is to be taken as the agent of Austin; the action can be barred only by showing that the agreement is binding upon Austin, and that Neale was, for such purpose, his agent. I do not think that even with more information I shall find the case without doubt and difficulty. All, however, I can do on the present occasion is to overrule the protest.

The proctor for the owners then appeared absolutely, and brought in 78*l.*, as the balance due under the agreement.

PER CURIAM.

I hope, Dr. Jenner, that this matter may be disposed of by some arrangement between the parties; if not, I must send it to a court of common law. I will not determine whether this is a valid agreement, one way or the other, without a full consideration.

The sum brought in, (78*l.*.) being refused by the other party, an act on petition in the cause was commenced; but the parties suing consented to receive that sum.

9

CASES

SELECTED FROM VOLUME VII.

OF

NOTES OF CASES.

Thomas Thornton.

[THE CASES SELECTED ARE THOSE NOT REPORTED IN THE REGULAR REPORTS.]

1849-1850.

NOTES OF CASES.

VOLUME VII.

* THE CHRISTIANA, Brown.

[* 2]

[This case will be found at the end of this volume.]

* THE FAME, Clay.

[* 55]

May 15, 1849.

Motion.

Practice. Pleading. In a cause of damage, after the act had been given in by the promovents, they were directed, on the application of the defendants, to alter the form of proceeding, and to bring in a libel, on payment, by the defendants, of the expense incurred by the act.

THIS was a cause of damage, commenced by act on petition. After the act had been given in by the promovents, the proctor for the party proceeded against now applied to the court to direct that the adverse party should proceed by libel. The proctor for the promovents submitted that it was now too late to alter the form of proceeding.

DR. LUSHINGTON, after some hesitation, and observing, that in such cases, application should be made as early as possible, granted the prayer of the proctor for the defendants, on condition that he undertook to pay to the other party the expense they had incurred by the act on petition.

[* 68]

* THE TRIAL.

December 18, 1826.

Freight ordered to be brought to answer a bottomry bond.

THE vessel was dismasted in a storm, July, 1825, in Rupert's Bay, Dominica, waiting for cargo. Being unable to refit at this island she went to Antigua, where the master, being without funds or connections, raised 2,000*L*. on bottomry, at eight per cent., hypothecating ship, cargo, "now on board or that may hereafter be put on board," and freight. The vessel returned to Dominica, took in more cargo, and arrived in the port of London, in February, 1826, where she was arrested at the suit of the bondholder. Several parties appeared as defendants,—the owners of cargo shipped at Dominica, in November, 1825, without a knowledge of the bond and of the liability of those goods, and the consignees who had paid freight in this country before and after the arrest of the ship, and were now required to bring the amount into court. On the part of the bondholder, it was contended that the whole cargo was liable to contribute to the payment of the bond. On the part of the shippers in Dominica subsequent to the date of the bond, it was urged that they were exonerated by reason of their ignorance of the transaction. The owners of the cargo shipped prior to the bond, opposed the exoneration of the latter parties. Those who had paid freight contended that they should not be called upon to bring it in; but it was replied that the alleged payment was only a deposit to the Dock Company, who would retain it for those legally entitled to it.

LORD STOWELL. I shall order the freight to be brought in. I had conceived the fact to be, that the parties knew nothing of the bond. With respect to the shippers abroad, I take the law to be clear, that where the master has deserted his duty, and given no notice of a bond, he is to be answerable; the owners of the goods must have recourse to him; he has neglected his duty. But those who knew of the existence of the bond should have taken care to whom they paid the freight; the laches is theirs. I never saw a more proper bond, or a lower rate of interest in such a case.

* THE SHAMROCK, Burbridge.

[* 112]

Motion.

June 20, 1849.

Collision. Practice. Where the amount of damage had been referred to the registrar and merchants, who reduced the claim of the plaintiffs from 1,375*l.* to 800*l.*, their report being confirmed, the court, on motion, condemned the plaintiffs in the costs of the reference.

THIS was originally a cause of damage, in which the owners of a schooner, called *The Thwaites*, sought to recover the value of their vessel, which had been run down by the brig *Shamrock*, off *Dun-geness*. The court, assisted by two elder brethren of the *Trinity House*, pronounced, (February 20th,) for the damage, with costs, and referred the amount to the registrar and merchants. The owners of the schooner gave in a claim for 1,375*l.* 9*s.* 11*d.*; the registrar returned only 800*l.* 13*s.* 9*d.*, taking off 574*l.* 16*s.* 2*d.* This report was confirmed on the 12th June.

Addams, Dr., on behalf of the owners of *The Shamrock*, now moved the court to condemn the other party in the costs of the reference, contending, that if the claim had been moderate, the owners of *The Shamrock* might have paid it, and thus have saved the expense of a reference.

Phillimore, Dr., for the owners of the schooner. The reference was a matter of course. This objection ought to have been set forth in an act on petition; the court would not decide such a question on motion. The principal deduction by the registrar and merchants was a claim made by mistake.

DR. LUSHINGTON. The question is, as to the costs of a reference to the registrar and merchants, which, in all cases of damage, * is of necessity made. The ground of the motion to [* 113] condemn the parties who have proceeded in the costs of the reference, is, that a very large sum was claimed and a comparatively small sum allowed.

The first point is, whether I ought to hear a question of this kind by way of motion, or whether it ought to have been raised by an act on petition. Now I am not prepared to say, that in all these

cases it is necessary to proceed in the latter form. I think I shall presently give good reasons why it is not incumbent on the parties so to proceed. The only object of proceeding by an act on petition would be the investigation of all the circumstances of the case, in order to satisfy the court that claims had been improperly advanced, and were of a nature not to be allowed. But when the report is once confirmed, it must be taken that the registrar and merchants have done rightly, and I take no other view of the case than appears on the face of the proceedings. There are various grounds on which the items might be allowed, or disallowed, as the case might be. It might be that the demand was exceedingly exorbitant; it might be that some of the items arose from pure mistake, and that others in their nature were of a doubtful character. It does not follow, I think, that any moral blame attaches to a party simply because he advances a claim before the registrar and merchants which they consider cannot be received. But I am not to decide the case on such considerations; I am to decide it on this principle, that a very large amount has been demanded, and that it has not been supported. Whatever may be the cause why the demand has not been supported, the court is not to inquire. I am not now speaking of a small amount; I never would deprive the party of costs where the variation between the sum claimed and the sum allowed was small in amount. The question is, whether, when it is very large, the court ought not to adopt the course usually taken, namely, to condemn the party who made the claim in costs. What is the principle of costs? To indemnify the party put to the costs. It does not follow that a party condemned in costs in an ordinary suit has [* 114] any blame attaching to him. He may *fail, having an excellent cause; he may fail because he has mistaken the law, or he may fail for want of evidence; but as the other party has been exposed to hazard, and as the law must inflict costs on one side or the other, it gives the costs to the party so exposed, without entering into questions of this sort. Supposing every one of these demands were not only *bond fide* made, but of a doubtful character, — a character which, in a moral sense, would justify the party who made the claim; if he fails, he is in the position of every other suitor who fails in his demand. In this case I shall pronounce for the motion, and compel the party to pay the costs, for the reason clearly stated by Dr. Addams, that if the demand had been precisely what it ought to have been in the contemplation of the law, it might have been paid in the first instance; and the party must have been put to expense, more or less, to effect the reduction. Common justice induces me to say, that where there is so great a failure as 575*l.* out of 1,375*l.*, the

party effecting that deduction, so far from being saddled with costs, is, in justice, entitled to them.

* THE VIVID, Robinson.

[* 127]

Cause, by Act on Petition.

July 12, 1849.

Collision. A steamer deviating from the Trinity House rules, in order (as alleged) to avoid the collision, held solely to blame. The importance of adhering strictly to the rules.

THIS was a cause of damage, by the owners of The Mayoress, a brigantine of 131 tons, against The Vivid, a steam-vessel, with which she came in collision on the 13th April, between Hasborough and Cromer. The brigantine, which was proceeding from Sunderland to London, with a cargo of coals, was close-hauled on the larboard tack. The steamer, on her way from London to Hull, on discovering the brigantine, (which was not until the vessels were close upon each other,) put her helm to starboard, as the only course whereby, according to her master, a collision could have been avoided; her engines being likewise eased and stopped.

* The court was assisted by two elder brethren of the [* 128] Trinity House.¹

The counsel for the steam-vessel, (*Drs. Addams and Robinson*,) were alone heard.

DR. LUSHINGTON. The gentlemen by whom I am assisted are of opinion that the blame, under the circumstances of the case, attaches solely to the steamer; and in that opinion I entirely agree. The reasons, however, which I am about to state for my judgment, are not those of these gentlemen, but my own.

I consider it a matter of the greatest importance to the safety of the great commercial interests of this country, having ships at sea with

¹ Captain Rees and Captain Farrer.

valuable cargoes, and still more valuable lives, to maintain, as far as I can, those rules and regulations which hitherto have been recognized in this court, and upheld by superior jurisdiction. We are constantly hearing of calamities which have occurred in consequence of collisions of this description, and therefore the observations I am about to make are for the sake of pointing out what I think ought to be done under circumstances similar to those now before us.

Supposing all which is stated by the steamer to be true, so far as the facts are capable of being proved, I should still retain my opinion that she was to blame. Here is a vessel on the larboard tack, close-hauled, and she describes a steamer at a certain distance. I lay out of the question, for the moment, whether this vessel did or did not show a light, and I now look to the conduct of the steamer herself. The master says in his affidavit, "The night being dark, but clear, a sail was reported by the look-out forward, close on the starboard bow of the steam-ship, which the smoke from her funnel, the wind being right aft, and there having been no light exhibited, or notice of her approach given, had prevented the look-out from seeing and reporting earlier. The helm of the steam-ship was immediately, by direction of the *deponent, put hard a-starboard, being, from the proximity of the two vessels, the only course that could be pursued with any chance of avoiding a collision, and her engines were eased and stopped." Now, first, I am of opinion that it was not the duty of the brigantine to get out of the way. I entirely admit the principle laid down by Dr. Robinson, that, where you can with perfect safety escape an accident by any manœuvre whatsoever, it is your duty to do it; but I wholly deny that danger would be averted, or that infinitely greater danger would not occur, if a vessel close-hauled on the larboard tack, on descriing a steamer, were to take upon herself to deviate from her course, for the purpose of getting out of the way, because I am of opinion that by so doing it would lead to the chance of infinitely more collisions than take place at present. The steamer knows her duty; she knows that she is to be considered a vessel having the wind perfectly free, and that it is her duty to get out of the way. The other vessel knows her duty, namely, that she is to keep her course; and if there were to be changes, in the manner suggested by counsel, on the part of vessels close-hauled, the consequence inevitably would be more collisions.

But how comes it that this steamer could not perceive the vessel approaching her on a night which is stated to be dark, but clear? According to her own statement, she could not see her until the very moment that the vessel was almost in contact with her, because the

smoke from the funnel obscured the sight of the persons on the lookout. What, then, was the duty of the steamer? To have slackened her speed, so as to give her a greater opportunity of avoiding any vessel with which there was a probability of coming into contact. That is the principle we must lay down, or what will be the consequence? Why, the inference from the statement here, if it were to be permitted to stand in a court of law, would be this,—that a steamer, being in such a condition that it was utterly impossible for her to see a merchant-vessel till they were close in contact, would be at liberty to keep up her speed near the coasts of England, where there are so many vessels, so that there would be no * chance of [* 130] avoiding collisions. According to her own statement, she was wrong. If it be contended, on the other hand, that there was any deficiency on the part of the vessel proceeding, on the ground of not exhibiting a light, or that the crew did not hail, the answer is plain. Parties may swear that they did not see a light, but that never can be received as evidence in opposition to those who say that they showed a light; because both statements may be true. The light may have been exhibited, and those on board the steamer may not have seen it. There is no contradiction here. So with respect to hailing. It may be true that there was hailing on board the sailing vessel, and that it was not heard by the steamer; but that does not contradict the fact. Therefore, in whatever point of view I look at the case, I entertain no doubt that the steamer was to blame. I am happy to think, gentlemen, that your judgment concurs with mine, without which I should have doubted its correctness.

* THE LADY KENNAWAY, Avery.

[* 130]

Motion.

July 12, 1849.

Salvage, Derelict. Claim by Greenwich Hospital. After a derelict had been in the possession of salvors for five days, a queen's ship came up, and was allowed to join in the remaining service, for which a salvage reward was allotted to her:—

Held, that the service so rendered by her was not rendered to a derelict, so as to entitle Greenwich Hospital to the percentage and unclaimed shares, under 57 Geo. 3, c. 127.

THE vessel, in this case, having been abandoned by her crew, in the Bay of Biscay, was fallen in with by two Danish vessels, and

The Lady Kennaway. 7 Notes of Cases.

taken possession of. After the derelict had been five days in possession of the Danes, H. M. brigantine Dolphin came up and assisted in conveying the vessel to Plymouth. In the adjudication of salvage, (the property being valuable,) the court allotted 1,500*l.* to The Dolphin. A monition was now moved for, calling upon the agents for that ship, (to whom this sum had been paid,) to bring in the accounts, in order that the percentage and shares unclaimed and forfeited might be handed over to Greenwich Hospital, pursuant to the Statute 57 Geo. 3, c. 127, on the ground that, at the time when The Dolphin came up, The Lady Kennaway was a derelict within the intention of the statute.

Sir J. Dodson, Q. A. The vessel, though found in the first instance by the two Danish vessels, when it is not denied that [* 131] she was a derelict, had not lost that character, * within the statute, when her Majesty's ship came up: she continued in that character until she was restored to her owners, or declared droits of admiralty. The definition of "derelict," is a vessel deserted by her master and crew, and not of right in possession of her owners. The *Thetis*.¹ The court has decreed salvage of this vessel as of a derelict; Greenwich Hospital must, therefore, be entitled to the percentage, and to the unclaimed and forfeited shares. If not, what is to become of them? Are they to remain in the hands of the agents?

Phillimore, Dr., Adm. A., on the same side. The objection is a narrow and technical one. The character of derelict was stamped on this vessel when found by the Queen's ship.

Addams, Dr., contrâ. The agents do not refuse to pay; they resist the monition on principle, until the court shall decide. It is asked what is to become of the unclaimed and forfeited shares? The same question would arise in every case of salvage. The sum allotted by the court was not given as for a derelict, but for civil salvage. The two Danish vessels had The Lady Kennaway in possession for five days, and navigated her for some hundred miles.

Sir J. Dodson. The 10 Geo. 4, c. 26, relates to matters of a similar kind.

¹ 3 Hagg. Ad. R. 228.

DR. LUSHINGTON. In the argument on behalf of the admiralty, (by whose directions, I presume, this motion was made,) it was said that this vessel was, in the proper sense of the term, found derelict by The Dolphin, within the terms of the act of parliament. I have looked at all the statutes referred to by counsel, but there is only one which bears upon the question at issue. This being so, the question lies in the narrowest possible compass.

The object of the 57 Geo. 3, c. 127, is twofold,—to give five per cent. and all unclaimed shares, in the case of prize-money, droits of admiralty, &c., to Greenwich Hospital, * and, by a [* 132;]] former act, five per cent. had been given on all salvage-money. There are no words in the 57 Geo. 3, c. 127, that apply to civil salvage, and I am not at liberty, in the construction of an act of parliament, to suppose that the omission was purely accidental. There can be no doubt that The Lady Kennaway was originally a derelict, and it is argued by her Majesty's advocate that she retained that character until the end of the transaction, consequently, that Greenwich Hospital possesses the claim now contended for. But it is utterly impossible that I can hold that this vessel was a derelict when The Dolphin came up, for she was then in the possession of six or eight persons engaged in performing salvage service. I did not decree salvage to The Dolphin on the ground that she had rescued a derelict; for the Lady Kennaway was not then clothed with that character; consequently, I am not at liberty to consent to the application now made.

* THE LEITH, Laker.

[* 137]

Cause, by Act on Petition.

July 18, 1849.

Collision between a sailing vessel and a steam-vessel; the latter having acted in obedience to the stat. 9 & 10 Vict. c. 100, held to be blameless. Construction of that statute.

THIS was a cause of damage, in which the owners of The Perthshire, a schooner of 126 tons, sued The Leith, a steamer of 600 tons, to recover the amount of damage sustained by the schooner in a collision between the two vessels on the 26th August, 1848, at midnight, near Gillingham Point, in Half-way Reach. The schooner, laden

with oats, bound from the Baltic to London, was coming up the river, the night being clear, the wind W. S. W. The steamer was going down the river on the south-side. The schooner alleged that she was close-hauled, and was hugging the Kentish shore, in order to avoid tacking, and that, when she discovered the steamer, she starboarded her helm, expecting the steamer would pass down mid-channel; instead of which, she ported her helm, and ran between the shore and the schooner, striking the latter a violent blow. On the part of the steamer, it was alleged, that, by the Trinity House rules, and under the 9 & 10 Vict. c. 100, ss. 9 to 13, she was justified in porting her helm, and if the schooner had done the same, no collision would have happened.

[*138] *The court was assisted by two elder brethren of the Trinity House.¹

Haggard and Jenner, Drs., for the schooner.

Addams and Robinson, Drs., for the steam-vessel.

DR. LUSHINGTON. Gentlemen, it is admitted, on behalf of the vessel proceeding in this case, that, upon descrying the steamer, the waterman, (who had been engaged to pilot the schooner,) who was the servant of the owner, ordered the man at the wheel to luff, which was done immediately, until the sails were shaking. In his second affidavit he states, that, when the steamer hove in sight, the helm was again put to starboard until the sails were shaking, as deposed to in his former affidavit; but that "the same was not at any time put suddenly a-starboard, and her head brought to wind, until immediately before the collision, and when the same, from the course pursued by the steamer, became inevitable, when the deponent put the helm hard a-starboard, to ease the blow." So far as I can make it out, the helm of The *Pertshire* was put to starboard almost from the time when she saw the steamer. He says he ordered the man at the helm to luff, the wind being W. S. W. All that he denies in this affidavit is, that the helm was "suddenly" put hard a-starboard, except at the last moment, when he says that it was *ex necessitate* put hard a-starboard, because the collision was inevitable.

I think the questions might be put to you briefly; yet it is, perhaps, my duty to notice some other circumstances which have arisen

¹ Captain Weller and Captain Foord.

in the discussion. But one of the questions will be this: whether, under the circumstances stated, you are of opinion that the helm of The Perthshire was put to starboard, and whether that was a right and proper measure.

With regard to the steamer, she was going from London down the river, and, according to the statement of all on board her, she had, from the time she left Brown's Wharf, *kept the S. [* 139] side of the river. Some discussion has arisen as to whether she did so in conformity with the statute 9 & 10 Vict. c. 100, to which statute, undoubtedly, it is necessary for every steam-vessel to attend. I do not think that there is any real difficulty in construing the statute, though I am of opinion that it might be expressed in much clearer language. The words of the enactment are these: "That every steam-vessel, when meeting or passing any other steam-vessel, shall pass as far as may be safe on the port side of such other vessel,"—respecting that there can be no doubt at all,—it is simply that they should pass on the port side; "and every steam-vessel navigating any river or narrow channel shall keep as far as is practicable to that side of the fairway or mid-channel of such river or channel which lies on the starboard side of such vessel." Now, certainly, it would have been clearer if it had been said, "which lies on the starboard side of such steam-vessel,"—whereas, some ambiguity is raised through the absence of that definition. Therefore, it is true, as I think, that, in keeping close to the southern shore, this vessel was following the orders prescribed by the 9th section of this act. But it is my duty to bring your attention to the words that follow: "due regard being had to the tide, and to the position of each vessel in such tide." These are very large qualifying words, for the clause means very much like this,—you shall keep along that side of the channel which lies on the starboard side of the vessel, provided it may be done with convenience or safety to the vessel you may happen to meet. Therefore, it is a rule laid down, but, with very great scope for the judgment of those who are to follow it. However, those on board the steamer followed this rule, and, upon descrying the schooner coming round Gillingham Point, according to their own statement, and no doubt it is true, they ported their helm. The sole question will be, whether they were right or wrong in so doing.

There are many facts in the case which really have nothing to do with the question. I cannot see what the track which was pursued by The Perthshire on the other side of *the river, [* 140] or at least at a considerable distance from the track of The Leith, has to do with the point you have to decide; nor do I understand what the course pursued by a schooner, which kept in the

middle of the river, has to do with it, because we must recollect that, when vessels are pursuing their course, a short space of time may lead to totally different circumstances, and may make it right for one vessel to go to the N., and for another following at no great distance to keep to the S. There has been some discussion as to the state of the wind and the tide: the latter has been agreed upon, and the former is said to have been W. S. W. On the one hand, it is alleged that the schooner was proceeding close-hauled; and on the other, it is said that she need not have been close-hauled if she had not pleased. You, being acquainted with the locality, can form your judgment as to whether she was close-hauled or not. You know what are the rules of the Trinity House, or rather what are the rules of navigation; because, when a steamer meets a sailing vessel, as much or more depends on the rules of navigation as on any rules you have laid down. Your rules are very specific as to steamers; but they do not embrace all cases of steamers meeting sailing vessels.

The question I put to you is, whether you think either or both vessels to blame, and which?

(After consultation.)

CAPTAIN WELLER. We think the schooner acted wrong in star-boarding her helm; we consider that she had the wind free, and that there was a flood tide. The Leith was justified in keeping close to the south shore in a slack tide, and acted properly in porting her helm.

PER CURIAM. I pronounce against this claim.

[*341]

* THE MINSTREL BOY.

Act on Petition.

February 6, 1835.

Bottomry bond not sustained, the advances having been made without hypothecation.

THIS was an action on a bottomry bond for Drs. 700, for advances by Mr. Samuel Hyfield, at Leghorn, dated 15th July, 1834, bearing five per cent. premium, and hypothecating the ship, tackle, and furni-

ture. The vessel had sailed from Liverpool on the 6th April, and arrived at Leghorn in May. On the 17th June, intelligence arrived there of the bankruptcy of Mr. Anderton, the owner, at Liverpool, on the 6th of June. The vessel sailed from Leghorn on the 25th July, and arrived at Liverpool in August.

In opposition to the bond, the assignees of the bankrupt owner alleged that the money had been advanced not upon the ship, but * on the credit of the owner. The vessel earned 86*l.* [* 342] outward freight, which had been received by Mr. S. Hyfield, who, (according to the master's affidavit,) continued to make advances for the ship till 14th July, when he refused to let her go without a bottomry bond, or to set off the 86*l.* he had received for freight against the disbursements on account of the ship, the whole amount of which had been advanced before the bond was proposed. On the part of the bondholder, it was alleged, that early in 1834, Anderton had purchased the vessel with the assistance of Hyfield and Co., brokers, of Liverpool, (of which firm, S. Hyfield, of Leghorn, was a partner,) who took upon themselves a liability for 500*l.* on account of the purchase, on condition that the vessel should be worked between Liverpool and Leghorn, consigned to S. Hyfield, at the latter place, who should have a power of attorney to sell the vessel, and that the freight should be received by him, (as well as the proceeds of the sale of the vessel,) until the accounts betwixt Anderton and Hyfield & Co. were liquidated. On the part of the assignees, this power of sale was denied; but they admitted that the earnings of the ship were to pass through the hands of S. Hyfield. The freight was, therefore, carried to the account of the firm, and no advances were made on the credit of the owner after the middle of June, when the news of his bankruptcy reached Leghorn. They further alleged, that after his bankruptcy, Anderton sent out a power of attorney to a Mr. Petty, at Leghorn, to take the vessel out of S. Hyfield's hands, which Petty refused, and Hyfield went on loading the vessel, but still declaring to the master that he would make no advances without a bottomry bond. Anderton, however, swore that he was not aware of his bankruptcy when he sent the power of attorney to Petty, and the master swore that the bond was really given to secure the balance of the advance made by Messrs. Hyfield & Co., at Liverpool.

Addams, Dr., for the assignees.

S. H. Jenner, K. A., for the bondholder.

SIR JOHN NICHOLL. My present impression is, that this bond cannot be sustained. The origin of the transaction shows a hard case on the part of Hyfield & Co.; but they have brought themselves into the difficulty by making advances upon Anderton's credit, and going on so to the end, till the bankruptcy took place. They might, in making the advances, and they should have insisted upon the hypothecation of the ship; but they continued to go on as usual, without the execution of any instrument, upon a sort of understanding [* 343] ing. The vessel goes out consigned to one of the * partners at Leghorn, and he is to receive the freight; but out of the freight the disbursements were to be paid. It is quite manifest, that Samuel Hyfield made advances on the credit of the owner of the vessel, and not upon any understanding that there should be a bottomry bond; there is no trace of it. Hyfield & Co. do not write such directions to him; there is no suggestion of it in any correspondence; but he goes on to make advances on the credit of the owner, till intelligence of the bankruptcy arrives. Anderton became a bankrupt on the 6th June; at that moment, the vessel and all his property vested in his assignees: they were the owners. If, on the receipt of intelligence of Anderton's bankruptcy, Mr. S. Hyfield had said, "I will do nothing more, but we will close the accounts between the owner and Hyfield & Co.," and from this time all advances had been upon the bottomry bond, on the authority of cases, had this course been taken, and there had been a clear *constat* that the advances were made solely on the ship, and on an understanding that there should be a bottomry bond, the court might pronounce that part of the bond valid. But there is no evidence of this. Here is one mass of accounts, dated 27th July, but no trace that such a course was taken from this time. If S. Hyfield had up to this time made himself liable for advances in cash, or other liabilities, it must have been on the credit of the owner, and he could not convert them into a lien upon the ship. The probability is, that from that time, he was endeavoring to get himself and copartners out of the difficulty in the best way he could, and he indorses upon the bill of lading that the freight had been paid at Leghorn, which was to the prejudice of the general creditors. There is nothing before me which will authorize me to pronounce for any part of this bond at present, and therefore I pronounce against it. But I think it a hard case against Byfield & Co., who undoubtedly advanced money for this vessel; but it was their own fault if there was no hypothecation, and no instruction to the brother at Leghorn; and, considering that it is a hard case upon them, as they must come in as general creditors, I shall not give any costs on this occasion.

* THE WILLIAM LUSHINGTON, Gill.

[* 361]

Cause, by Act on Petition.

January 29, 1850.

Salvage. An agreement or understanding between the owners of the vessel salvaged and the owner of a cutter engaged by them to render the service, — no specific sum being fixed therein: —

Held, not to bar the parties suing (including the master and crew of the cutter,) who acted in the service under the personal direction of the owner of the cutter, but were not parties to, or cognizant of, the understanding. An agreement, though it may estop parties from suing, cannot affect the nature of the service.

THIS was a cause of salvage by two licensed pilots and eight seamen of Plymouth, to obtain a recompense for alleged salvage services rendered to this vessel, timber-laden, from Quebec to Plymouth, which, on the 28th August, 1848, got upon a ledge of rocks between Mother-Combe and Stoke Point, in Bigbury Bay. The salvors alleged, that being informed by her owners that the vessel was stranded in Bigbury Bay, they proceeded thither, and found her masts cut away, and no person on board; that they set to work to clear the rigging, in which they were aided by the crew, who subsequently returned on board, and, at a later period, The Sir Francis Drake, merchant steamer, acting in concert, under the direction of James Hyde, they got the vessel off the rocks, and into Plymouth Sound, whence she was removed into Catwater, and safely anchored, under the direction of Hyde. On the part of the owners, it was alleged, that on receiving intelligence of the stranding of their vessel, they proceeded to Bigbury Bay, and having eased her, by cutting away her masts, they hired a steamer, (The Sir Francis Drake,) to tow her into Plymouth, and engaged James Hyde, a pilot whom they had been in the habit of employing, (the owner of the cutter, whose master and crew were some of the asserted salvors,) to assist in the service, it being understood between them, as on all former occasions of a similar kind, that a fair and proper charge was to be made by Hyde for the whole of such service, including the pay of the cutter's crew, when the same was completed; that the pretended salvors acted under the directions of their employer, Hyde, and that not one of them was engaged by the owners, but all were employed solely by Hyde, in pursuance of the agreement and undertaking entered into between him and the owners, and for the costs and expenses of the performance of which agreement the owners were

liable to Hyde; wherefore they prayed the court to pronounce that no salvage was due to the parties suing.

[* 362] * *Harding*, Dr., and *Twiss*, Dr., for the salvors.

Sir J. Dodson, Q. A., for the owners of the vessel.

Robinson, Dr., for the owners of the cargo.

DR. LUSHINGTON. (After pronouncing that the service was a salvage service.)

That being so, the next point in the case is, what was the agreement, and what is the effect of it? It has been argued that the agreement was to affect the nature of the service itself: that is utterly impossible. An agreement, if entered into, might be a bar to the parties recovering a salvage reward, because they would have estopped themselves from proceeding in the suit; but to suppose that an agreement can convert that which is originally a salvage service into one of a different nature, is to suppose that which is utterly inconsistent with every principle of law. It is very true, that where a vessel is on shore, in the manner that this was, and where the owners are cognizant of it, and select their own salvors, though they cannot convert a service, which, from its own nature and kind, is inconvertible, yet they may protect themselves against a demand for performing it, by entering into an agreement, and fixing in some way the amount of reward that shall be paid. This they are fully at liberty to do. Now, what takes place on the present occasion? Mr. Thomas Pope was the individual with whom the original agreement was made. He states, "When he and his brother were discussing together about the hire of a smack, his brother suggested that James Hyde, a pilot,—whom he and his brother, who are owners of many ships, were in the habit of employing for the last fifteen years, for pilotage and other purposes of their ships, and who is the owner of the cutter *Surprise*, of about fifty tons burden, Hyde being also the owner of the cutter *James* and *Elizabeth*,—might be usefully engaged for the purpose of bringing the sails, rigging, and stores to Plymouth." Even these words of Mr. Pope himself would support my conviction that this vessel was hired for a salvage service. If the vessel had been hired simply to bring away a certain * quantity of gear lying on shore, it would have been [* 363] a very different question. She was hired not only to do that, but to strip the vessel, which requires nautical knowledge and skill, and to render other services to the vessel lying on the rocks

This was a general engagement to enter upon the service, and Mr. Pope did not entertain a doubt of it. It was not expected that this cutter would go out and tow the vessel to Plymouth. It required a greater force to extricate her from the situation in which she was placed than the cutter possessed, and hence the assistance of The Sir Francis Drake was procured, with which it was competent for the owners of The William Lushington to make an agreement which should bar a claim for salvage. But let us see what was done, according to the statement of Mr. Pope. He says, "Accordingly, he went to James Hyde and engaged him to go to the ship, with his cutter, The Surprise, and with such of his men as he could depend upon, to assist in clearing the rigging and bringing the same, and the sails and stores of the ship, to Plymouth." He further swears: "that no bargain or agreement was made for any sum to be paid to James Hyde, for such service, James Hyde saying, as they could not tell what time it would take, no sum could be fixed." Now, I am asked to consider this as an agreement by the counsel on behalf of the gentleman who swears that no bargain was made. Can I infer from any of these statements, that any specific agreement was made at all? The counsel, who took all the pains he could on behalf of the owners of the ship, said they were ready to pay, but not for a salvage service; and at last it dwindled down, in the expression of Dr. Robinson, to "a sort of understanding." That will not bar a claim for salvage. In order to bar such a claim, there must be a distinct agreement between the parties for a given sum, and in explicit terms.

But there is a great deal more. All this is done with one individual, James Hyde. Though I should be reluctant to hold that he was not competent to bind his people, yet there is nothing to convince me that they were cognizant of, or went out in the belief that he had made a particular agreement with Mr. Pope. It is singular enough that, at *the conclusion of his affidavit, [*364] this gentleman says, "Although no agreement or understanding as to the compensation or remuneration for the services to be rendered was made, yet, in reply to a question respecting remuneration, James Hyde said, that as they could not tell what time it would take, the sum could not be fixed." Here is this individual repeating that the sum was to be left undetermined, but he denies that any understanding existed that they were to be paid salvage, or that salvage was alluded to. Suppose it was not, we must look to the service itself which was performed. I have not a shadow of a doubt that this was a salvage service, and assuredly there was no agreement that could bar the parties.

The suit is not brought by Mr. Hyde himself, who, for reasons satisfactory to his mind, thinks proper not to come forward and assert any claim for the service so performed. It is not a service of very high character; it was performed at a time when the weather was moderate; there was no very great exertion; and, looking at all the circumstances, and estimating the value of the property at from 2,400*l.* to 2,500*l.*, I think 120*l.* is not an extravagant sum.

[* 371]

* THE IX OF MARTZ.

December 7, 1836.

Case of Collision.

THIS was a cause of damage, in which the owners of the brig *Carnation*, of 281 tons, sought to recover the loss sustained in a collision with the Prussian vessel IX of Martz. The Act on Petition alleged that the brig, with a cargo of coals, bound from Newcastle to Cronstadt, on the 9th September, 1835, anchored in the Sound, below Elsinore, at the entrance of the Baltic Sea, and on the following day weighed anchor, and endeavored to beat through the Sound against a strong current, (the wind being variable,) until the 16th, when she succeeded in passing Elsinore, with several ships in company, and continued beating into the Baltic against a foul wind until the 20th, when she got past Copenhagen; that, on this day, there was a fresh breeze from the S., with clear weather, and at four P. M. The *Carnation* was plying to the S.; that, at about 4.30, she was reaching to the S. W., on the larboard tack, Steven's Head bearing S. W., there being a good look-out kept, several vessels being in company, and amongst others the brig IX of Martz, bound from Newcastle to Swinemunde, in Prussia, with coals, which was reaching to the E. on the starboard tack, and coming close up to The *Carnation*, the wind blowing strong S. by E.; that the crew of The *Carnation*, observing that there was great danger of the two ships not going clear of each other, she was hove about, in expectation that the IX of Martz would keep her reach, or go about, instead which, she put her helm a-weather, to go under the stern of The *Carnation*, but not doing so in time, she ran foul of The *Carnation's* starboard side, with full force, doing her so much damage that she was obliged to put into Copenhagen to repair, and was not able to

recommence her voyage to Cronstadt until the 15th October, *in consequence of which delay, on her return voyage, [* 372] she was frozen in and compelled to winter there until April, 1836. On the part of the foreign owner of The IX of Martz, it was alleged, that on the 19th September, the wind blowing from the S., with a northerly current, and clear weather, the pilot quitted the vessel outside of Dragoë, when she beat up towards the land as far as Steven's Land, and at 4 P. M. tacked from the land and stood on the starboard tack, it blowing fresh from the S., and the weather being hazy, with rain; that shortly afterwards The Carnation was observed on the larboard tack, standing towards The IX of Martz, and that vessel not offering to bear up, the master of The IX of Martz put her helm a-lee, but owing to the sea, she missed stays, and, (The Carnation being then under the lee of The IX of Martz,) fell on board of her, and The Carnation, being already thrown in the wind, was not put in stays, and the vessels remained foul of each other for about an hour.

The court was assisted by Captain Young and Captain Wellbank, from the Trinity House.

The *King's Advocate* and *Addams*, Dr., for The Carnation.

Phillimore, Dr., and *Haggard*, Dr., for the Prussian vessel.

SIR JOHN NICHOLL. In this case, before I apply to these gentlemen for their opinion, there are one or two observations upon the case which I think it proper for the court to make.

These two vessels were trying to get out of the Sound into the Baltic, with an adverse wind, and each was beating to windward. It is admitted that one of the vessels, The Carnation, was on the larboard tack, and that the Prussian vessel was on the starboard tack. They were approaching each other, and there was a probability of a collision between them. The affidavit of the master, mate, and five seamen of the British ship, on the part of the plaintiffs, states, that "at 4 P. M., of the 20th September, The Carnation was plying to the S., and at about half past 4 the ship was reaching to the S. W. on the larboard tack; that, at the same time, there were several vessels in company, and amongst others the brig IX of Martz, which was reaching to the E., on the starboard tack, and coming close up to The Carnation, the wind at such time blowing strong S. by E.; that the deponents and the rest of the crew of The Carnation having observed, that in consequence of this proceeding on the

part of The IX of Martz, there was great danger of the two [* 373] ships not going clear of each other, * they hove The Carnation about, in expectation that The IX of Martz would keep her reach, or go about; instead of which, she put her helm a-weather, to go under the stern of The Carnation, but not doing so in time, she ran foul of The Carnation's starboard side, and with full force." From this statement it does not appear when or at what distance they first saw each other; but I am told that it was not until they were close together, and there was no possibility of avoiding a collision. But there is another affidavit from two apprentices, belonging to The Coronation, Crass and McKinley, and their statement is, that, "about half past 4 P. M., The Carnation was reaching to the S. W., on the larboard tack, when the deponents saw The IX of Martz at the distance of about half a mile to the leeward of The Carnation, and reaching to the E. on the starboard tack." So that they saw her half a mile off, The Carnation being on the larboard tack and the other vessel on the starboard tack; and this is admitted in one of the plaintiff's own affidavits. In this state of things, one vessel being on the larboard tack and the other on the starboard, and the vessels being seen from each other half a mile off, it is acknowledged to be the rule of navigation, and I shall hold it to be so, unless these gentlemen say it is not the rule, that when two vessels are on contrary tacks, the duty of the vessel on the larboard tack is to give way, and the duty of the vessel on the starboard tack is to keep her course: there was ample time, it being daylight; and if this had been done, no collision would have taken place. These gentlemen have read the affidavits, and are aware of the rules of the sea, and will be able to decide which party has given the true account. I beg, therefore, to ask your opinion which vessel was to blame, and what was the cause of the collision. There has been considerable loss and damage in this case, which is an unfortunate case, but the court must act according to the principles of justice.

(After consultation.)

These gentlemen are clearly of opinion that the blame is attributable to The Carnation, in not bearing up in time, and in attempting to go to windward of the foreign vessel. The Carnation, being on the larboard tack, should, in accordance with common usage, in the first instance, have bore up and given way.

(The foreign vessel dismissed with costs.)

* THE WOODPARK, Whitehead. [*397]

Cause, by Act on Petition.

March 1, 1850.

Collision between two vessels, on different tacks.

THIS was an action by the owners of the fishing-smack *Atalanta*, of fifty-six tons, against the brig *Woodpark*, of 195 tons, to recover for the damage done to the smack in a collision between the two vessels; a cross-action having been entered by the owners of *The Woodpark* against *The Atalanta*.

The owners of the latter vessel alleged that she was returning home from her fishing-ground in the North Sea, and about half past 9 P. M., on the 15th November, was proceeding up the Swin, close-hauled on the starboard tack, the wind blowing strong from N. W. and by W., the night rather dark, but clear enough to permit vessels being seen from each other at more than a quarter of a mile distance, the master being at the helm, and others on deck, when *The Woodpark* was observed upon their lee bow, distant about a quarter of a mile, reaching up on the larboard tack; that the course of the smack was not altered, but she was kept as close to the wind as she would lie, until, at the moment when a collision appeared inevitable, the master, finding that the brig could not go ahead of his smack, as she was endeavoring to do, put his helm to port, which threw the smack up into the wind, and at the same moment the brig came in contact with her, doing her much damage; that the collision was caused solely through the carelessness or mismanagement and want of nautical skill of those on board the brig, and that, if they had ported their helm, as they were bound to have done, the brig would have gone under the stern of the smack, and no collision would have occurred.

The answer of the owners of the brig alleged that she was on a voyage from Shields to London, with coals, and about 8 P. M., of the day of the collision, she had got under weigh, (having anchored near the Shears Light House, * on the Maplin [*398] Sand, to wait for the tide,) and stood towards the Mouse Light; that about a quarter past nine, being then about midway between the Mouse Light and the Black Tail Beacon, she tacked and stood to the N. E., on the larboard tack, the wind blowing a

fresh breeze from about the N. N. W., the night fine and clear, though dark, all hands being on deck, the master near the helm; that whilst so standing to the N. E., The Atalanta was observed standing to the W., on the starboard tack, distant about 200 fathoms, and open about four points on the brig's lee bow; that the master immediately ordered the man at the helm to mind his weather helm, and pass a-stern of the smack, by keeping the brig's sails full, and that immediately thereupon the brig's helm was put to port, and her head began to fall off; that the smack, instead of keeping her course, as she ought to have done, shortly after put her helm also up, and by so doing stood directly towards the brig; that, it being evident a collision must ensue if both vessels kept their helms up, (being then so near,) they hailed the smack to keep her helm up, the brig's helm being put a-starboard, as the only means of avoiding a collision; but the smack, instead of keeping her helm up, again altered her course, by putting it down, and thereby brought herself right athwart the brig's bows; and that the collision was imputable solely to the smack.

The Court was assisted by two elder brethren of the Trinity House.¹

Jenner, and R. Phillimore, Drs., for the smack.

Addams, and Bayford, Drs., for the brig.

DR. LUSHINGTON, (addressing the elder brethren):— Gentlemen: The course I propose to pursue is the following. I will first take the statement of The Atalanta, and then see, whether, supposing it to be true, you can attribute to her either the whole blame, or any share of the blame, which gave rise to the collision.

It appears that The Atalanta was a fishing-vessel, of [* 399] fifty-six * tons burthen; that she was returning from her fishing-ground, and on the 15th November, about half past nine P. M., she was proceeding up the Swin, close-hauled on the starboard tack, with the wind N. W. by W. There is a difference as to the quarter from which the wind blew; it is stated on the other side, that it was N. N. W., being three points more to the N. You will take that circumstance into your consideration, and see whether it so operates as to make any difference in the case. It is then further alleged, on the part of The Atalanta, that she saw the brig,

¹ Captain Weller and Captain Foord.

which is a collier of 195 tons, on her lee bow, distant about a quarter of a mile, the brig being on the larboard tack. Here, again, there is some considerable difference between the statements; because, on behalf of the collier, it is stated that she saw the smack four points on the brig's lee bow, which is certainly a very considerable difference between the statements of the parties as to what were the relative bearings of these two vessels at the time they were first descried by each other. However, assuming the statement of The Atalanta, for the present to be true, the master, as soon as he perceived the brig, so being on the larboard tack, according to his own statement, did not alter the course of the smack at all, nor did he alter it till the collision became inevitable. As soon as he perceived that the collision was inevitable unless something was done, he states that he put the helm to port; that the vessels presently afterwards came in contact, and the smack was struck by the brig on the larboard side. This is his statement; and the charge against the brig is, that she ought to have ported her helm in time, so as to have avoided the collision, she being on the larboard tack and The Atalanta on the starboard tack.

But in the course of the argument it was observed, that, whatever the result of the facts may be, it was the duty of The Atalanta, though on the starboard tack, instead of keeping her course as she did, to have ported her helm as soon as she saw the brig, and so, by her own act, have avoided the collision. You will have to determine whether any share of blame attaches to The Atalanta for not porting her helm as soon as she perceived the other vessel, but keeping her course and *porting only when the collision [*400] was almost certain. So much for The Atalanta.

On the part of The Woodpark, which was a coal-laden vessel, bound to London, it is stated that she was standing to the N. E. on the larboard tack, the wind blowing from the N. N. W., when she saw the smack four points on the brig's lee bow, and her helm was put to port. Supposing this to be correct, as a matter of fact, I apprehend that would have been a proper measure for her to have pursued, as soon as she descried the smack. Therefore, so far, (if it be true,) no blame attaches to her. But then she makes a charge against the smack, which, she states, put her helm to starboard. If the smack, under these circumstances, did put her helm to starboard, and you credit it, according to my apprehension, subject to your judgment, the smack was undoubtedly to blame in so doing, and nothing was more probable than that there would be a collision. If one put the helm to port and the other to starboard it would increase the probability. But this is not the whole of her statement. She

says the brig's people hailed the smack to keep her helm up, and changed their own course from porting to starboarding the helm. Two questions then arise; first, whether you believe this was done; and, secondly, whether you think the brig was right or wrong, supposing it was done. Then they say, that the smack put her helm to port, and so the collision took place.

These are all the facts. It is useless to refer to the affidavits, because the affidavits and the statements in the act on petition precisely accord; and you must determine which of the parties is to blame. I do not think it necessary to enter into the question as to what was done after the collision, which is a question not necessary for us to determine. The points appear to be these: whether you are of opinion that the collision arose from the brig not porting her helm in time; or whether you are of opinion that the smack really did starboard her helm, and so produced the collision; or whether you think the smack was too tardy in porting her helm.

[*401] * CAPTAIN WELLER. The Woodpark, being on the larboard tack, ought to have bore up on first seeing The Atalanta, so as to show her intention to pass to leeward, agreeably to the established rules. We think her to blame, and attach no blame to The Atalanta.

PER CURIAM. I pronounce for the damage.

THE EDWARD, Haase.

Cause, by Act on Petition.

March 1, 1850.

Collision between two vessels on contrary tacks.

THIS was an action by the owners of the late brig Melissa, 177 tons, against the brig Edward, 179 tons, of Wismar, (Mecklenburg Schwerin,) to recover for the total loss of the former vessel, which was sunk in a collision between the two vessels.

The act alleged that The Melissa was on a voyage from North Shields to Barking, with coals, and about ten P. M. of the 8th November, she was off the coast of Yorkshire, Flamborough Head

Light, bearing S. $\frac{1}{2}$ E., and Scarborough Light, bearing N. W. to N. W. by N., the wind blowing strong from W. S. W. to S. W. by W., the brig steering S. S. E., when the look-out forward reported a ship ahead, and the master saw a vessel, distant from a quarter to half a mile, standing towards her; that the strange vessel shortly after bore up, standing to the N. on the larboard tack; that, upon her bearing up, The Melissa's helm was ported, and she kept her luff, and her head came up close to the wind; that in about a minute afterwards, the strange brig, (which was then to leeward,) again altered her course, luffed up to the wind, and stood directly towards The Melissa, the master of which, seeing that the strange brig was still from 100 to 200 yards distant, kept his luff, expecting the other vessel would bear up again, and hailed her, but she came stem on, and struck The Melissa, (her helm being still hard to port,) violently on the larboard bow, doing her considerable damage, * and in about three hours she sank, the crew saving them- [*402] selves in their boat; and that the collision was occasioned solely by the carelessness, or want of skill and of good management, or of a good look-out on the part of The Edward.

The answer, by the foreign owners of that vessel, alleged that she sailed that day in ballast from Hull for Newcastle; with an assistant pilot on board; that at about half past nine P. M., the wind blowing strong from the W. and by S., the brig was on the larboard tack, close-hauled by the wind, lying from N. W. by N. to N. N. W., when about two miles from the shore, (Scarborough Castle bearing N. W. by N.,) The Melissa was seen ahead, a little on the starboard bow of The Edward, upon which a lantern was shown from the brig's starboard bow, all on board hailing the other vessel to bear away, but, though running free, she kept approaching The Edward without any alteration of her course; that a collision appearing inevitable, the pilot on board The Edward, (as the only means, if not of avoiding the collision, of lessening its effect,) ported her helm and lowered her peak, at the same time hailing The Melissa to luff and keep her helm down; that The Edward, after she had ported, did not (as alleged) again alter her course, and luff up to the wind, and stand towards The Melissa, for, on the contrary, almost immediately on The Edward's helm being ported, and before she could have again altered her course, the collision took place, by The Melissa striking The Edward with great force on the starboard bow; and that the collision was imputable solely to The Melissa, which was running free, not bearing away at all, or not in time.

The court was assisted by the same Trinity Masters as in the preceding case.

Haggard and Bayford, Drs., for The Melissa.

Addams and Twiss, Drs., for the foreign vessel.

DR. LUSHINGTON, (addressing the elder brethren): Gentlemen:

It is admitted that the collision, which is the subject of the [*403] present suit, was not occasioned by * accident, for each of the litigant parties attributes it to the mismanagement of the other. You have heard some discussion as to what are the rules laid down by the Trinity Board, and as to their application to the circumstances of the present case. Of course, before you look at the rule and see how it applies, it is necessary to look at the facts of the case, in order to make up your minds as to which is the true statement. It was argued by the counsel on behalf of The Edward, that she was close-hauled, and that The Melissa, sailing free, though on the starboard tack, ought to have given way, as The Edward was so close-hauled. In order to ascertain the fact, whether The Edward was close-hauled or not, several things are necessary to be known. You must take into consideration, first, the locality where the collision took place; then the destination of the two vessels, and the course they were pursuing, and afterwards you will decide the quarter from whence the wind blew, according to the best of your judgment, from the evidence on both sides. Here two of the points at least are clear; The Melissa was coal-laden, bound from Shields to Barking; The Edward was proceeding in ballast from Hull to Newcastle. The place where the collision occurred is stated in very nearly the same terms by both parties; I need, therefore, only refer to one of these statements, and I take that on behalf of The Edward. The answer says, she was about two miles from the shore, Scarborough Castle, bearing N. W. by N., when her master and crew, who were all on deck, saw a vessel ahead, a little on the starboard bow; so that two of these points are clear, namely, the destination of the vessel and the locality. Now we come to the wind. It is stated on behalf of The Melissa to have blown from W. S. W. to S. W. by W., and her course is stated to have been S. S. E. The Edward alleges that the wind was W. and by S. So far as I can make out, there is about a point or a point and a half difference between them, as to the wind. The proper course of the respective vessels must be left entirely to your judgment; it is a point of nautical knowledge. You will have to determine whether you are of opinion that The Melissa, though on the starboard tack, was sailing free, [*404] * whether The Edward was sailing close-hauled; and whether it was or was not the duty of The Melissa to give way.

If it was her duty to give way, you must consider what was actually done; if it was not her duty to give way, of course very different consequences would ensue.

We will proceed, then, with the facts of the case. According to the statement of *The Melissa*, she first descried *The Edward* on her starboard bow. There is some difference here from the statement on the part of *The Edward* as to the bearing of *The Melissa*; but I hold these matters to be of very little importance, for it is extremely difficult to extract from the evidence, in any of these cases, the precise bearing of one vessel to the other, when they are descried at night, the bearings so often shifting. If the vessels are approaching each other, and there is a reasonable chance of a collision, all your rules apply, and it is not necessary to determine whether their bearing was a point one way or the other, knowing from experience that it is utterly impossible so to do. With regard to the distance at which these vessels were seen from each other, there is a great discrepancy, as there is in every other case. I apprehend there really must be very great difficulty in measuring the distance at night, and I hardly recollect a collision case in which the parties did not differ on this point, and there is not only a difference between the two ships, but among the men on board the same ship. There is an obvious reason for this: the crew are too much engaged to measure the distance between the two vessels with any degree of accuracy. We may dismiss this matter, therefore, from our consideration.

The statement on behalf of *The Melissa* is this: she alleges, that *The Edward* bore up,—as to whether that fact was so or not, you must make up your minds; that she was standing to the N. on the larboard tack; and she says, that under these circumstances, she ported her helm, and the collision occurred in consequence of *The Edward* having starboarded her helm, and so striking *The Melissa* on the larboard bow. That is her complaint against *The Edward*.

On the part of *The Edward*, the case is very differently stated; for having first represented that a lantern was hung out * on the starboard bow, they state that they hailed *The* [* 405] *Melissa* to bear away, because she was going free; and, therefore, they expected her to starboard her helm. But they say she kept her course until a collision became inevitable, when the helm of *The Edward* was ported, and the collision took place because *The Melissa* did not port in time.

We must now look at the affidavits made in this cause on the part of *The Edward*, because it strikes me that they are of very considerable importance. I hold in my hand the first affidavit of Haase, the master, and Heidtman, the mate. They say, they could dis-

tinguish objects at the distance of a mile and a half; that they saw a strange vessel ahead, and a little on the larboard bow, and they showed a lantern; that the strange vessel was running free; that the brig was then about two English miles from the shore; that they hailed the strange vessel to bear away, but no notice was taken whatever. Here the whole story closes, and the affidavit simply states, that the strange vessel came in collision with the brig, striking her on the starboard bow. As to any thing done on board The Edward, there is not an atom of evidence. The next affidavit is to the same effect. We must, however, refer to the affidavit of Crow, the assistant pilot, who was skilled in navigating between Hull and the northern ports. He says, the wind still blew from the W. and by S., the brig being on the larboard tack, close-hauled by the wind. Several vessels on the starboard tack passed on the larboard side of the brig. This I do not quite understand. He says, that, at half past nine P. M., he could distinguish objects on the sea at a distance of a mile and a half; that when the strange vessel approached within hailing distance, she was hailed to bear away. I should like to have had it explained in the argument, how it was, considering that all the other vessels which had been passing to the S. had passed on the larboard side, that this vessel was hailed to bear away; but I have had no explanation on that point from counsel. We now come to a passage in this affidavit entirely omitted in the evidence both of the master and the mate:—"The strange vessel still continuing to *approach, this deponent immediately ported the helm of the brig, and lowered her peak." It must have been known to the master, the mate, and the crew, whether these measures were adopted or not; but they say nothing respecting it. I now come to the conclusion of this affidavit—"That, in the judgment of this deponent, the collision arose entirely through the neglect of the captain and crew of the strange vessel in not keeping a proper look-out." But that is not all. "If the helm of the strange vessel had been luffed in proper time, she would have sailed clear of the brig, whose helm this deponent had put hard a-port." I should have been very glad to have had some explanation of this fact; but I have had none.

You will form your opinion as to which of the stories is true. If you think The Melissa was bound in the first instance to have starboarded her helm, unquestionably she did not, and she would, therefore, be to blame. If you think that she was not bound to starboard her helm, it appears that she did all that she ought to have done. With respect to what The Edward did, I confess it is not very certain what measures she did take.

CAPTAIN WELLER. We consider that the wind was W. S. W., very nearly, within a quarter or half a point, in which case both the vessels had the wind free; the course of the one was S. S. E., that of the other N. N. W. The collision was caused by The Edward not porting her helm and passing to leeward.

PER CURIAM. I pronounce for the damage.

* THE GRECIA, Paige.

[* 410]

Motion.

March 7, 1850.

Bottomry. Additional articles, appended to a charter party, signed by the master, acknowledging the receipt of money on account of his freight, (for which he had paid insurance,) which, with other moneys, he stipulated should, "on his safe arrival in London," be deducted from his freight, and in case his freight should not be sufficient to pay the same, "the debit shall be retained as a bottomry bond:" on motion to decree payment of these advances, as on bottomry, out of proceeds of sale of the vessel in the registry—

Held, (without deciding whether, if the facts were otherwise, this was a bottomry bond,) that there was no maritime risk, nor proof that the advances were for the necessities of the ship.

THE vessel, in this case, had been sold under a decree of this court, in a cause of bottomry, and the proceeds of the sale, 803*l.*, had been brought into the registry to answer two bonds, amounting to 609*l.* It appeared, that, at the end of the charter-party, were, signed by the then master, the following

ADDITIONAL ARTICLES.

The charterer undertakes to pay to the captain, on account of the freight, 400*l.* sterling, for which the captain shall pay the charges of three per cent. for once, and moreover the insurance that shall result upon the account which shall be produced to him in London.

The captain, also, undertakes to pay the difference of insurance that may arise between the Moldavian flag and the Austrian flag, as customary to be paid upon vessels underwritten at Lloyd's, in London.

Gallatz, 3^d October, 1848.

(Signed) T. N. MITROS.

The Grecia. 7 Notes of Cases.

I, the undersigned, Captain T. N. Mitros, in command of the Moldavian brigantine, called Grecia, declare to have received of, and from my shipper, Sig^r S. Goldner, once, the sum of 400*L*., for which I have already given the regular receipt, and there remains for this to pay the insurance, whatever shall be the amount, according to the account thereof in London.

Furthermore, I declare to have received of and from the aforesaid, on account, also, of my freight, the sum of 882*L*., for which I have already paid the insurance, as appears by the second receipt, given by me, so that the total amount received, added to the 400*L*., makes 1,282*L*., which, on my safe arrival in London, shall be deducted from my freight, and in case my freight should not be sufficient to pay the above sum, for whatever reason the same may be, the said debit shall be retained as a bottomry bond.

Gallatz, the 24th Nov^r 1848.

(Signed) T. N. MITROS.

From the accounts annexed to the affidavit of the agent of Mr. S. Goldner, it appeared, that after deducting the amount of [* 411] * freight, there was a balance due to him of 799*L*., which, it was submitted, he was entitled to receive, under the additional articles, as on a bottomry bond, so far as the remaining balance of the proceeds of sale of the ship, (after deducting the 609*L*., due under the two bottomry bonds,) would pay the same; and

Twiss, Dr., moved the court to decree a warrant to issue against the proceeds in the registry on behalf of Mr. Goldner, the holder of the bottomry bond indorsed on the charter party. There is no precedent of a bottomry bond indorsed on a charter party; but it is submitted, that the form is not restricted. There is apparently a maritime risk, namely, "on my safe arrival in London;" and maritime risk seems to be the substantial foundation of a bottomry transaction. The articles directly stipulate, that "the debit shall be retained as a bottomry bond." The court has held, that an agreement for a bottomry bond is as valid as a bond itself. *The Aline*.¹

DR. LUSHINGTON. As the sum is small, it is desirable that the court should dispose of the question at once; although this is a mere preliminary proceeding, to arrest the money that remains in the registry.

¹ 1 W. Rob. 111.

It appears that this claim is founded upon certain additional articles appended to a charter party, which bore date originally on the 2d October, 1848, and finally, these additional articles bear date on the 24th November, in the same year; and it is upon the strength of these articles, more particularly the latter clause, that the application is made to the court to arrest the proceeds.

Some very considerable difficulty arises upon the first view of the question, because a bottomry bond must not only include maritime risk, but also it must be for the necessities of the ship, and the court must be satisfied before it can pronounce for the validity of a bottomry bond, and decree it to be paid out of the proceeds of the vessel, * that the money was advanced for that pur- [*412] pose. But I have here no statement of that kind, nor the slightest evidence to show that it was more than a simple advance upon the freight,—for what purpose I am left in total ignorance. That is not the only difficulty, because there follows this clause, “for which I have already paid the insurance.” So that the master, who receives in advance of 882*l.*, eventually to be paid out of the freight, has actually paid the insurance; so that no maritime risk was run on the freight, on the part of the person who advanced the money, the risk being of a different description, namely, in case the freight should prove insufficient to answer the demand; but maritime risk there is none.

This is quite enough to dispose of the present application, without entering into the question, which would deserve consideration if the facts were otherwise, namely, whether this is a bottomry bond at all; for all that is said is this, “In case my freight should not be sufficient to pay the above sum, for whatever reason the same may be, the said debit shall be retained as a bottomry bond.” It is perfectly true, that, in one case,¹ under the peculiar circumstances, I did hold an agreement for a bond a valid bond; but it is not to be inferred from thence that I should be ready to adopt that as a general principle, unless the same or similar circumstances to those that occurred in that case would lead to a similar conclusion.

Looking to the circumstances of this case, it would be useless to arrest the proceeds in the registry, for I think I should not be justified in paying them out. The motion must be rejected.

¹ The Aline, 1 W. Rob. 111.

[* 503]

* THE PURISIMA CONCEPCION, Trigo.

Motion.

March 25, 1850.

Salvage. Claim by an agent for Lloyd's, who was permitted, under the circumstances of this case, to sue as a salvor, but was held to be entitled to only his disbursements and an allowance of five per cent. on the sum advanced, as a reward for his trouble.

In this case the vessel, belonging to Spanish owners, bound from Drontheim to Bilbao, in October, 1848, was stranded near Bridlington. Mr. Waters Brambles, ship-agent, and also agent for Lloyd's, took charge of her, and employed men to unlade her, and the vessel was got off the strand, and conveyed into the harbor of Bridlington, where the cargo was sold and dispersed. The charges of Mr. Brambles being disputed on the part of the owner, he arrested the ship in a cause of salvage. His claim was resisted, on the ground that he had been employed as agent; that he had rendered no personal service and incurred no personal risk, and therefore could not legally sue as salvor. The court held,¹ that the action was maintainable, but made no allotment of salvage pending a reference to the registrar and merchants of all the accounts of moneys received and paid, in relation to the cargo as well as the ship; reserving all questions, including costs.

[* 504] * The registrar now reported that there had been expended by Mr. Brambles, on account of the ship, 95*l.* 16*s.* 7*d.*, and on account of the cargo, 264*l.* 14*s.* 10*d.*; that by an account, purporting to be an account sales of the cargo, brought in by the proctor for Mr. Brambles, (not verified on oath,) it appeared that, after charging himself with 56*l.* 3*s.*, the sums expended exceeded the net proceeds of the cargo, (240*l.* 12*s.* 8*d.*.) and that nothing remained in his hands on account thereof. They further reported, that the crew of the vessel, consisting of seven men, were not employed in assisting to effect the services charged for, by the employment of whom, various expenses, in many instances apparently excessive, would have been unnecessary.

Harding, Dr., for the salvor.

Addams, Dr., for the owner.

¹ 3 W. Rob. 181.

DR. LUSHINGTON. This has been a most unfortunate case. The property originally was very small, and, it appears, is now reduced next to nothing. The court has throughout been placed in circumstances of very considerable difficulty. The cause commenced by the arrest of the ship, and the ship only, on the 10th of March, 1849, in an action entered on behalf of Mr. Brambles, in the sum of 300*l.*, as a salvage suit. On the 22d March, Mr. Coote appeared for the owner, in objection to Mr. Brambles suing as salvor, and prayed to be heard on his petition. The act was brought in, and an answer given to it, and I was called upon to hear the case as it stood, in that naked state. After having read the act, and considered the exhibits, it appeared to me that I was not in a condition at that moment to decide the case; indeed, I had not sufficient evidence to enable me to do so justly, and if I had released the ship, I should have acted unjustly, as I should have taken out of the hands of the asserted salvor his only security for his demand. I reserved the question of costs until I had heard the case argued on the main question. Accordingly, the main question was then set forth in an act on petition, and the case finally came under the consideration of the court on the 28th July. On that occasion I do not deny that I

* felt considerable difficulty and doubt as to whether or not [* 505] Mr. Brambles was entitled to sue as salvor. It appears, that on the vessel arriving at Bridlington, Mr. Brambles, who filled the office of Lloyd's agent, went down to her, tendered his assistance, and employed persons, by whose means the ship was brought into a place of safety, and the cargo unladen. It was stated that he acted in all these matters as agent, and agent only; that he never performed any part of the work with his own hands, or incurred any personal risk, and was therefore not entitled to commence an action as a salvor. I think, assuming that all the disbursements were properly made, it would have been competent to Mr. Brambles to have sued in another form of action, under the statute, for necessities; but this cannot afford a foundation for a suit for salvage. I am not able to find any case precisely resembling this; but there were cases, not reported, in which similar difficulties had arisen, which are now removed by the statute. After having very much considered this case, I do not think that I ought to reject the claim of Mr. Brambles as salvor. I consider it difficult to draw the line between a person acting as agent and as salvor; but I wish it distinctly to be understood that this case must not be drawn into a precedent, or that I am deciding that a person who acts as agent is entitled to sue as salvor; and in allowing the party to sue in this case, I hold that Mr. Brambles is entitled to be paid for no more than the actual sums he dis-

bursed to other persons, (who are the persons entitled to be considered as properly salvors,) and for a reward and compensation for his trouble, and no further.

With respect to the report of the registrar and merchants, they have come to the conclusion that Mr. Brambles is out of pocket, on account of the ship, 95*l.* 16*s.* 7*d.*, and, with regard to the cargo, which is not proceeded against, he is out of pocket 264*l.* 14*s.* 10*d.*; and I apprehend the registrar and merchants have reported to me all the *bonâ fide* claims, and the only doubt is as to the expenses falling on the ship itself, under the following objection. It appears that [*506] the crew of the vessel, consisting of seven men, were not employed in assisting to effect the services, "by the employment of whom, various expenses and charges, contained in the schedules, in many instances apparently excessive, would have been rendered unnecessary." No doubt this observation may be true; but it does not follow that this is to be charged to the account of Mr. Brambles, for it may happen, as it has happened in many other cases, that the sailors of a foreign vessel are unwilling to render assistance.

The result is, that Mr. Brambles, — laying out of consideration the expenses as to the cargo, — is out of pocket 95*l.* 16*s.* 7*d.* It appears to me that his interference was accepted by the master, and I see no reason to think that he was actuated by any improper intention, or any wish but to discharge his duty fairly and honestly. The affidavit of Lieutenant Foord, of the Coast Guard, states, that if Mr. Brambles had not promptly used proper measures in getting the cargo out of the ship, and the ship into the harbor, on the 6th, 7th, and 8th of October, either on the 9th or 10th the ship would have been, in all probability, wrecked by the violence of the winds and sea. I am of opinion that Mr. Brambles is entitled to be reimbursed the sum of 95*l.* 16*s.* 7*d.*; and I am of opinion that he is entitled to some reward for his trouble; but, under the unfortunate circumstances of the case, I think it right to reduce it to the smallest sum, and I shall allow him five per cent. on the money he advanced.

With regard to the costs, I am clearly of opinion that I am bound to give him the costs in the original proceeding, and I see no reason why he should not be entitled to the remainder of his costs.

*THE OSMANLI, Corbett.

[* 507]

Cause, by Act on Petition.

April 16, 1850.

Collision between a steamer and a sailing-vessel,—the former held to be in fault for not wearing in time. Effect of protests, as evidence in such cases.

THIS was an action by the owners of the late schooner Cape Packet against the iron screw steamer Osmanli, to recover for the total loss of the schooner in a collision between the two vessels, a cross action having been entered by the owners of The Osmanli.

The act on petition, on the part of the owners of the schooner, alleged that, in the prosecution of her voyage from Antwerp for Cork, with a cargo of wheat, when standing towards the land on the Irish coast, (distant twenty to twenty-five miles,) at half-past eleven P. M. of the 21st December last, the wind being E. S. E., the night starlight, vessels being visible at least a mile off to seaward, the schooner being close-hauled on the starboard tack, a light was seen under her lee, which soon appeared to be approaching her; that the mate held up her signal lantern to leeward for seven or eight minutes, and, as the light still kept approaching the schooner, the watch on deck loudly hailed the vessel, (The Osmanli,) to keep away, notwithstanding which, she came stem on, (steaming at full speed,) into the schooner, striking her with such violence that she sank very shortly, her master and one of the crew being drowned; and that the collision was solely occasioned by the misconduct of those on board The Osmanli, in not keeping a good look-out, or otherwise.

The answer, by the owners of the steamer, alleged that she was bound from Palermo to Liverpool with fruit and general merchandise; that on the night in question, which *was [* 508] very dark and overcast, the watch was set, one man being stationed in the forecastle, and three men on the main deck, keeping a good look-out, three lights being hoisted; that there was a strong breeze from E. by S., with rather a high sea, and the steamer held her course, heading S. S. E., close hauled on the port tack; that the look-out man in the forecastle made out a vessel, (The Cape Packet,) on their leebow, which, in a few moments, showed a light, and he then saw she was steering a N. E. course, and standing directly towards The Osmanli, as if to cross her bows; that no hailing was

heard from the schooner, and the look-out men, instantly on discovering the course of the schooner, called out to the man at the wheel, "hard a-port," which was repeated by the mate, who ordered the engine to be stopped; that both orders were immediately obeyed, and The Osmanli began rapidly to pay off; but the schooner closed upon them too fast, without altering her course, and the vessels came in collision, two or three minutes only having elapsed from the time the schooner was first seen; that if she had made the slightest effort to avoid the collision, it would not have occurred; that the steamer was proceeding at a moderate speed, (five and a half knots,) and that the collision was wholly imputable to those on board The Cape Packet.

The court was assisted by two elder brethren of the Trinity House.¹

Addams and Twiss, Drs., for the schooner.

Haggard and Robinson, Drs., for the steamer.

DR. LUSHINGTON, (addressing the elder brethren.) *Gentlemen: I think it will be expedient, in the first instance, that I should direct your attention to that which has formed the principal part of the argument on behalf of the owners of The Osmanli, namely, the situation and conduct of The Cape Packet; and whether any blame is attributable to her, we will consider to be the first question in this case.*

The facts lie in a very narrow compass. She was at the [* 509] * time from twenty to twenty-five miles off Cork, standing to the N. E., on the starboard tack, and close-hauled; she saw the steamer, though she did not know that it was a steamer, at a certain period antecedent to the collision. It has been very strongly contended by the counsel you heard last, that it was the duty of The Cape Packet to have shown a light as soon as she saw the steamer. Now you are very well aware that no question has been more often mooted, and left more unsettled than this, — whether it is the duty of a sailing vessel at night to show a light. Beyond all doubt, it has been determined that there is no such general obligation; at the same time there have been occasions on which, for the sake of avoiding a misfortune which was in all human probability likely to occur, it became the duty of a vessel to show a light. On the very last

¹ Captain Wellbank and Captain Farquharson.

occasion when I was favored with the assistance of two gentlemen from the Trinity House, it was determined, in the case of *The Fairy*, that, in the river Mersey, on a very dark night, a vessel being towed up to George's Dock should have shown a light. That was an exception to a general rule. Whether there is such exception on the present occasion I will not positively say, because I do not think it essential to decide that point. The character of the night is differently represented on either side. On the part of *The Cape Packet* it is alleged to have been starlight; on the part of the steamer it is said to have been a dark night. It does not appear to me, looking at all the facts and circumstances of the case, that it was a very dark night, or that the weather was very peculiar in that respect.

As *The Cape Packet* did show a light, it will be better, perhaps, to consider whether she exhibited it in due time. What is the evidence on that point? You have heard a great deal of discussion upon the contents of the protest which has been produced on behalf of *The Cape Packet*, and it is said that its representations are at variance with the statement subsequently to be found in the affidavits. Let me first draw your attention to the protest itself, and consider what is its true and fair construction.

It is said that the protest is the first document in a cause, and generally made *recenti facto*; but it frequently happens * that it is not made until a later period. In this case the [* 510] protest of *The Osmanli* was not made until the 7th of January; but it ought to be made as soon as possible after the circumstances occurred. The protest of *The Cape Packet* bears date on the 24th December, the circumstances having taken place on the 21st of that month, which is as soon as reasonably could be expected. It is said that the parties ought to be bound by the protest, whatever may be its terms, and that any statement subsequently made must be cast aside, if it contradicts it, and the protest adhered to. Now I dissent from that doctrine altogether, and for various reasons. The statement in the protest is a statement given by unlearned men, — in this instance it was made by the mate alone; but sometimes it is made by masters who are not, and cannot be expected to be, very expert in relating their story clearly before notaries public, who, whatever may be their merits in drawing a clear consecutive statement, I never find display that merit in drawing a protest; and both the protests in this case are very inartificially drawn. I never can trust, whatever be the case, the accuracy of a notary public, or the exercise of his judgment, when he is selecting such facts as he thinks right to put in a protest. He may not be aware of the real point at

issue; and to hold, therefore, that a protest is to override all other evidence, would be to embark in a course of downright injustice.

In the protest of *The Cape Packet*, the parties on board are made to speak first as to the collision: "About half past eleven on the night of the 21st inst., the vessel being then between twenty and thirty miles off the land, and Cork harbor bearing N. and by W., the wind being about E. S. E., with strong weather, the vessel being under double-reefed mainsail," and so on, the collision took place. That is the way it is stated, and you see how inartificially. Instead of taking up the matter chronologically, it commences with the collision, and then it goes on to state the facts afterwards. The main object of a protest is, to support demands against the underwriters or insurers; it has no reference to proceedings in this court. A protest

is of great importance in salvage cases, because there the [* 511] parties make the best case * they can against the underwriters. The appearers go on to say: "Being their watch on deck, about half an hour previous to the collision and striking, they saw a white light in the rigging of a vessel, which they afterwards discovered to have been the steamer, and as soon as they perceived the steamer approaching them, and being then about fifty fathoms off, they shouted and hailed the steamer, and Barrett also held up a lantern and light, but unavailingly; she did not alter her course, but ran into and struck *The Cape Packet*." Now it is certainly true, on the first blush, that this statement would represent that the steamer was not discovered until she was about fifty fathoms off; that they then shouted and hailed, and held up a light, all at the same moment. It appears to me, that, although due deference is to be paid to this protest, yet, if you think the statement subsequently made is a more correct one, you are fully at liberty so to consider it, notwithstanding the apparent confusion between the two. It appears to me exceedingly doubtful whether or not these persons, whatever might have been the opinion of the notary, intended by these words to declare that all these circumstances were exactly contemporaneous. That they were so is against all probability, and I do not think it is likely that they would have made such a statement. But be that as it may, let us look at the evidence. They say that they held up a signal lantern for seven or eight minutes. That is disputed, and it is said that it was only two or three minutes. They then say, that *The Osmanli* came stem on, and struck the schooner amidships on the larboard side; and there is an end of all that was done on the part of *The Cape Packet*. What ought *The Cape Packet* to have done? First, it is said, there was not a good look-

out. I see no reason to conclude that she had not a sufficient look-out. Then, it is said she did not show a light until three minutes before the accident. According to the statement on behalf of The Osmanli, she did show a light three minutes before the actual collision, and the question will be, whether even then she did not show a light in sufficient time; because if you should be of opinion that three minutes was sufficient time, if there was a due regard to * expedition and a good look-out on board The Osmanli, [* 512] to have enabled her to prevent the collision, there is an end to the whole question of The Cape Packet not showing a light in time. Let us see how this stands.

I take the statement of The Osmanli from her owners' act on petition. It is there said, "There was a strong breeze from E. by S. — not E. S. E., as alleged — with rather a high sea, and the steamer held her course heading S. S. E., close-hauled on the port tack; that between half past eleven and twelve o'clock P. M., the look-out man on the fore-castle made out a sail on their lee bow, and immediately called out, 'Sail on the lee bow;' that the said vessel had no light up." Now, to show how the protests are drawn up, the protest on behalf of The Osmanli, after stating that the night was very dark, goes on to say, "a sail was observed on our lee bow, apparently standing towards us, and the order was immediately given to port our helm and stop our engines, both of which things were instantly done, and our vessel began to pay off rapidly; but, notwithstanding, in about three minutes she came into collision with the other vessel." Why, we find in this protest nothing said here about lights. Then, after having gone through the facts of this unfortunate collision, and stated that The Osmanli bore up for Cork, the protest proceeds: "When The Cape Packet was first observed on our lee bow, as before stated, we were heading S. S. E., under steam and fore and aft sails, and going at the rate of not more than from five and five and a half knots." I think I have said enough to justify my observation, that we must not be led altogether by the protest. They saw her, according to their statement, before they saw a light; they saw that she was standing to the N. E., and orders were given to put the helm to port and stop the engines, which was immediately done. They say that the steamer began to pay off, but The Cape Packet came on with much force, being close-hauled, and that the collision arose in consequence of her so coming athwart her bows.

Now, gentlemen, you will consider whether all was done that could be done, and with due expedition; or whether, supposing * the engines had been stopped, it is possible that [* 513] such a collision as this could have occurred, and with a

force that not only sent The Cape Packet to the bottom, but stove in the bows of the steamer. If the engines had been stopped there would have been a great diminution of the power with which the blow was struck. With regard to the rate at which The Osmanli was going, and whether it was safe or not, I must leave that to your consideration. The question, then, will be, whether you consider The Cape Packet to blame in any of the circumstances set forth in the pleadings, and commented upon by counsel; or whether you think The Osmanli was to blame for not having, with greater expedition, adopted those measures which were requisite in order to avoid the accident.

CAPTAIN WELLBANK. We are obliged to limit our judgment in this case to two facts in dispute,—the speed of The Osmanli, and the time that elapsed between the period when she first perceived the light and the collision. The Osmanli was running under both sails and steam, about six knots an hour; three minutes elapsed from the time when she first perceived the light of The Cape Packet, and three minutes was enough to enable the steamer to wear. The steamer is to blame, and the other not.

PER CURIAM.

I pronounce for the damage done to The Cape Packet, and dismiss the cross action, with costs.

[* 538]

• THE BENARES, Brown.

Cause, by Act on Petition.

April 25, 1850.

Collision between two sailing vessels: the defence set up by the vessel proceeded against, namely, that it was occasioned by inevitable accident, not sustained.

THIS was an action by the owner of part of the cargo on board the bark Royal Archer, against the bark Benares, to recover their loss in consequence of a collision between the vessels. Four actions were in fact entered against the ship and freight on behalf of different owners of the cargo, and for the crew of The Royal Archer for their private effects. The pleadings were concluded on the 8th of April.

and it was not until the 15th of April that an action was entered on behalf of the owners of The Royal Archer, and of owners and ship-pers of other parts of the cargo.

The facts were these : The Royal Archer, of 310 tons, bound from London to Port Adelaide, with general merchandise, at half past three A. M., on the 19th of December, was in lat. $6^{\circ} 7'$ N., and long. $19^{\circ} 42' 30''$ W., close-hauled on the larboard tack, steering S. S. W., the wind blowing from the S. E., when she saw The Benares, distant about a mile ahead, a little on the weather bow, standing to the N., with all sails set, and running free. According to The Royal Archer, she kept her course for two minutes ; but, seeing The Benares coming stem on, she put up her helm, let go the mizen sheet, paid off rapidly, and would have gone to the leeward of The Benares if the latter had kept her course ; instead of which, however, * she also put up her helm and paid off ; in consequence of [* 539] which, the vessels in a few minutes came into collision, and The Royal Archer shortly afterwards sank. According to The Benares, a bark of 524 tons, proceeding from Calcutta to Liverpool, she did not, from the state of the weather, see The Royal Archer until within two or three ship's lengths of her, and she was then directly ahead, on the starboard tack. Orders were immediately given to put the helm "hard up ;" but before The Benares had time to pay off more than a point and a half, The Royal Archer came into collision with her, doing her considerable damage. The Benares alleged that The Royal Archer did not show a light, and keep as close-hauled as she ought to have done ; but her principal defence was, inevitable accident. The cargo lost, independently of the ship, was valued at 30,000*l*.

The Court was assisted by two elder brethren of the Trinity House.¹

Addams and Bayford, Drs., for the parties proceeding.

Robinson and Twiss, Drs., for The Benares.

DR. LUSHINGTON, (addressing the elder brethren.) Gentlemen : The amount of property destroyed on the present unfortunate occasion is great, and it is probable that there being so large a property at stake has led to the length of these proceedings, into which I think

¹ Captain Hayman and Captain Gordon.

it will not be necessary to enter minutely, because, according to my conception of them, there is matter introduced, to a very considerable extent, upon which it will be utterly impossible for you safely to rely. I allude to the transactions which took place after the collision,—to the alleged conversations and the asserted admissions which are said to have occurred at different times during the six weeks or two months subsequent to the collision. There are several reasons why I do not trouble you with this part of the case. There

is one, which is rather a matter of law than a point for your [* 540] consideration. I doubt exceedingly whether the * declaration of any common seaman ought to be received as evidence against the owners of the ship, and I am satisfied that to take loose conversations as evidence, would lead to no available purpose. It is unnecessary, therefore, to trouble you with any comments on this part of the case. I have had occasion to observe before, that when matters of this kind are introduced, it is only accumulating a quantity of paper,—it does not assist us in coming to any conclusion.

The facts of the case, so far as it is necessary to trouble you with them, appear to be these. The vessel proceeding, *The Royal Archer*, was bound from London to Port Adelaide. The collision occurred on the open ocean, at a considerable distance from England. The wind is admitted to have been S. E.; the course of *The Royal Archer* was S. S. W., that of *The Benares* N. W. to N. W. and by W. *The Royal Archer*, therefore, must have been on the larboard, and *The Benares* on the starboard tack. In the course of that night, Morrison, the first mate of *The Royal Archer*, had the watch; there was a man on the look-out, and Patterson was at the helm, when a vessel was seen directly approaching *The Royal Archer*. Some little interval occurred before any measures were taken; but as soon as Morrison had ascertained to his satisfaction that she was approaching in a direct line, he ordered the helm to be ported, which was done, and he himself let go the mizen sheet.

With regard to *The Benares*, it appears that Walker, the second mate, was on her deck; that Monro was at the helm, and Mills ought to have been the look-out man, but a great deal of dispute has arisen as to whether he was really on the look-out or not. The defence in the original proceedings on the part of *The Benares* is to the following effect: that, in consequence of the weather, it was impossible for them to perceive *The Royal Archer* sooner than they did; that a good look-out was kept, the best that could be, under the circumstances. They say nothing as to the reason why they starboarded their helm, but they charge this collision upon *The Royal Archer*, in

these words : that if The Royal Archer had shown a light when she first saw The Benares, and had kept her course by the wind, which it was her * duty to have done, the collision would certainly have been avoided, for the look-out man might have been able to see a light sooner than the vessel herself.

These are the facts of the case, and I am not going to trouble you with any discussion of the conflicting evidence as to where Mills was at the time in question, and for a reason which will appear presently sufficiently obvious. It is very true, (and I think it right to make the observation,) that whenever I see one of the crew of a vessel, defendant in the cause, produced in support of the case of the opponent, I look at his evidence with some degree of suspicion. I am not justified in disregarding it altogether,—I am bound to look at the *res gestæ* ; but there is generally such a disposition to adhere to the vessel to which a man belongs, that it is improbable that he would voluntarily come forward to give evidence against his own ship, unless there had been some strong means employed to induce him so to do ; and you will recollect, that, in this form of proceeding, all these affidavits are voluntarily made ; whereas, when the proceedings are by plea and proof, a witness can be compelled to be examined.

I will now suggest certain questions to you as to the conduct of these two ships. First, with regard to The Benares, Was there, or was there not, according to your judgment on the evidence, a good look-out ? It is said that the weather was so bad it was impossible, with any care and caution that could have been used, to have seen The Royal Archer at any distance, so as to have time to consider what measures were fit to be adopted. But was the weather really so very dark and gloomy as to justify this assertion made on the part of The Benares ? You cannot believe that the weather was so dark and gloomy as to prevent one vessel from being seen from the other, unless you should come to the conclusion that the whole of the story on the part of The Royal Archer is false and fictitious ; because she states that she saw The Benares seven or eight minutes before the collision. If that be a fact,—which I see no reason to doubt,—was there any reason why, if there had been a look-out on the part of The Benares, she should not have seen The Royal * Archer about the same time ? I have been con- [* 542] sidering whether from the quarter from which the wind blew, or any other cause, there was a probability of The Royal Archer discovering The Benares at a period much earlier than The Benares could perceive The Royal Archer ; but such a cause does not occur to me, though it may to you. That is the first point ; but here comes a second, of which I have heard much less than I expected to hear.

It is admitted that the helm of The Benares was starboarded as soon as The Royal Archer was discovered. Was that right or wrong? If it was a wrong measure to adopt, then it does not signify what the look-out was. So much for The Benares.

With respect to The Royal Archer, the case stands thus: the fault alleged against her, as I have already stated, is, that she should have shown a light. I have naturally looked to see whether The Benares showed a light, and I do not find that she did. I do not know that it was more incumbent on the one vessel to exhibit a light than on the other. But you will recollect, with regard to showing lights, that, generally speaking, in the open sea, there is no general obligation to show a light, though under peculiar circumstances it may be obligatory; but, generally speaking, in the open sea, it is not incumbent upon a merchant-vessel to show a light. It is further said, that The Royal Archer was wrong in porting her helm, — that if she had kept her course, the collision would have been avoided. You will say whether she was wrong in porting or not. The counsel for The Benares very ingeniously turn the tables, and say that The Royal Archer was first wrong in porting her helm; and, secondly, in not porting it sooner. These are the points on which I request your attention. You will have the kindness to tell me your opinion as to the conduct of the two vessels.

CAPTAIN HAYMAN. My brother and myself are decidedly of opinion, that The Benares was wrong. In the first instance, on seeing The Royal Archer, it was her duty, instead of putting her helm up, to have put it to port. We think, that if, after she saw [*543] the other vessel, she had ported, * she would have gone quite clear. It has been laid down, that this ship coming before the wind, it was her duty immediately to have ported her helm, not to have starboarded it. The other ship being on a wind, on the port tack, it was her duty to have borne up as soon as she could discover which way the other vessel was going. We do not consider that any blame is attached to The Royal Archer, because, as soon as she saw The Benares approaching her at a rapid rate, she immediately put her helm up, and eased off the mizen sheet. We consider that all the blame must be attributed to The Benares.

PER CURIAM. I pronounce for the damage.

* THE ST. LAWRENCE, BROWN.

[* 556]

Cause, by Act on Petition.

May 2, 1850.

Collision. Where the master of an American vessel, held not to be in fault, did not, at the time of the collision, order out a boat and afford assistance to save the life of a seaman who had fallen overboard from the other vessel, and was drowned, — the court in pronouncing in favor of the American owners, refused to decree their costs. The owners of a vessel are responsible, civilly speaking, for the whole conduct of the master, and for any deviation from that line of conduct which it behooves a master to perform, not simply in the navigation of the ship, but in offices of humanity.

In this case, in which cross-actions were brought by the owners of the two vessels, the British schooner *Cosmopolitan*, of 109 tons, bound from Liverpool, with cargo, for Africa, and the American ship *St. Lawrence*, of 420 tons, having, besides a full cargo, fifty-three emigrants, bound * from the same port for New [* 557] York, left the Mersey on the 25th August, 1848, and went down channel together, pursuing nearly the same course. At four P. M., of the 27th, whilst in the Irish Channel, the vessels came in collision, and *The Cosmopolitan*, the smaller vessel, received so much damage, that, apprehending she would sink, the master and crew, ten persons, (one being drowned,) took refuge on board *The St. Lawrence*, by climbing up the bowsprit's shrouds. Both vessels were sailing close-hauled on the larboard tack, the wind being S. W., the *St. Lawrence* half a mile ahead. According to the schooner, whilst her crew were preparing to tack, *The St. Lawrence* suddenly stood towards her, on the starboard tack; the schooner immediately ported her helm, but *The St. Lawrence*, instead of keeping her luff or porting, as hailed to do, kept her helm to starboard, and struck the schooner on the starboard bow. The case of the American ship was, that she expected the schooner would have borne away and gone to leeward; whereas she kept her course, and endeavored to cross the bows of *The St. Lawrence*, thereby occasioning the collision. It was charged against the master of the American vessel, — a charge denied on his part, — that he had refused to lend one of his boats to endeavor to save the life of the English seaman. The *Cosmopolitan*, having been subsequently boarded by some fishing-smacks, was brought into Kingstown harbor, and a suit for salvage was instituted against her in the Admiralty Court of Ireland.¹

¹ 6 Notes of Cases, Supp. xvii.

The court was assisted by two elder brethren of the Trinity House.¹

Addams and Bayford, Drs., for The Cosmopolitan.

Jenner and Deane, Drs., for The St. Lawrence.

DR. LUSHINGTON. (After pronouncing, with the concurrence of the Trinity Masters, in favor of The St. Lawrence in both actions.)

But with regard to the question of costs, there are two [*558] *peculiar circumstances in this case; one is, that a *man* on board The Cosmopolitan, in consequence of the collision, fell into The sea and was drowned; the other is, that application was made to the master of The St. Lawrence by the master of The Cosmopolitan to put him and the mariners on board his own ship, some time after the collision had taken place.

With respect to the first point, as to the question of fact, it is distinctly sworn by Maxwell, (the master of The Cosmopolitan,) and other persons who have made affidavits with him, and is corroborated also by the American seaman who has made an affidavit in the cause, that the man did fall overboard, and that application was made to Brown, (the master of The St. Lawrence,) for the loan of a boat, in order to attempt to recover the man. How is this met by affidavits on the other side? By the affidavit of Brown himself, stating that he was not cognizant even of the fact of a man being overboard. This does not agree with the affidavit of his own steward, for all he swears is, that a man did fall overboard and was lost, and he does not represent that an application was made by Maxwell, the master of The Cosmopolitan, for the loan of a boat. That is all he states. But it is utterly impossible to believe for a moment that such an occurrence did actually take place,—that a man was lost in the manner stated, when the weather was perfectly fair, in the month of August and in daylight,—it is impossible, I say, to conceive that such an accident occurred, and that the master was in ignorance of it. I utterly disbelieve it, and comparing the statements on one side and on the other, I have no hesitation in declaring, whether he refused or not, that he did not do that which it was his bounden duty to have done,—to have ordered the boat, and afforded every possible assistance to save the life of a fellow-creature.

¹ Captain Rees and Captain Farrer.

Is that a ground for refusing costs or not? If I sought precedents I have a reported case,¹ decided by Sir John Nicholl, in which he refused costs under similar circumstances. * But [*559] I want no precedents; I want nothing but principle to guide me. I must hold here, and I ever shall hold, that the owners of a vessel are responsible for the whole conduct of the master whilst on board his vessel and in command of that vessel. I do not mean to say that they can be responsible, criminally speaking, for any act he may have committed of a criminal nature, for, of course, in that case the responsibility and the punishment can attach only to the wrong-doer; but, civilly speaking, the owners are responsible for any deviation from that line of conduct which it behooves a master to perform, not simply in the navigation of the vessel, and in the care of his own seamen, but in the care of those who may be thrown on board his ship by an accident of this description, and for the performance of any office of humanity. If they choose to employ a person who will deviate from the performance of these duties, and then come to this court, they will not receive any favor from me as to costs.

I pronounce in their favor, but I refuse to decree costs.

* THE NIMROD, Pile.

[*570]

Cause, by Act on Petition.

May 14, 1850.

Salvage rendered by one steam-vessel to another which had broken the intermediate shaft connecting the two engines, — suit sustained, but the case of the salvors held to be exaggerated, and their claim most exorbitant.

THIS was a cause of salvage by the master, owners, and crew of the steam-vessel *Blenheim*, of 399 tons and 400 horse-power, against the steam-vessel *Nimrod*, to obtain a remuneration for salvage services rendered to her. The salvors in their act alleged that *The Blenheim* was on her voyage from Belfast to Liverpool, with passengers and cargo, when, at 2 A. M. on the 18th April, whilst she was

¹ *The Celt*, 3 Hagg. Ad. R. 328.

steering S. E. and $\frac{1}{2}$ S., the look-out man reported lights on the starboard beam, whereupon the master distinctly made out towering lights in a S. S. W. direction, distant about twelve miles, and considering that in all probability they were exhibited by a vessel in distress, he determined to bear down to her, and, altering the vessel's course, steered towards the lights, which he approached within eleven fathoms water, and at the distance of two miles, when he made out that the lights were hoisted on board a vessel (The Nimrod) lying broadside to the sea, completely covered with signal lights, and having an ensign hoisted at her main-mast head; that it being 3.30 A. M., still dark, with the wind blowing hard from N. E. to N. N. E., and a heavy sea, it was found impracticable to approach her nearer without very great risk; but the master of The Blenheim, being aware that The Nimrod was in a very dangerous locality, and must be greatly in need of assistance, determined to lie by her until day-break; and as soon as it was sufficiently light, The Blenheim was steered towards The Nimrod, whose master, when within hailing distance, stated that his vessel was disabled, and her machinery broken down, and requested the master of The Blenheim to take her in tow, at which time The Nimrod was rolling very heavily, and driving broadside on right into the bay on the west end of Hoyle Bank; that, after considerable difficulty and risk, The Blenheim succeeded in getting two hawsers on board The Nimrod, and took her [*571] *in tow, steering a course E. N. E., to clear the buoy off the Constable Bank, and towed her to Liverpool, where they arrived at 8.30 A. M. of the same day; that, had it not been for the ready and efficient assistance thus rendered by The Blenheim, The Nimrod would have gone on shore in the bay on the west end of the Hoyle Bank, where she must have been lost, with her valuable cargo, and in all probability the lives of all on board, inasmuch as she was driving broadside on right into the bay, with the force of wind and sea, and the flood tide setting on to the shoals.

The answer of the owners of The Nimrod, (the Cork Steam-Ship Company,) alleged that that vessel, of the burthen of 493 tons, and of three hundred horse-power, was on her voyage from Liverpool to Cork, with passengers and cargo, when, at 10 P. M., of the 17th April, Point Lynas Light bearing W., distant four miles, and Beaumaris Light bearing S. by E., distant eight miles, the intermediate shaft connecting the two engines broke, thereby disabling the starboard engine, but without injuring the larboard engine, which could have been easily worked if necessary; that on the shaft breaking, sail was set upon The Nimrod, and she was wore round to the N. and E.; that the wind blew a strong breeze from the N., and the

steamer headed E. by N. to E. by N. $\frac{1}{2}$ N., making for the N. W. light-ship, and made good a course of about S. E. by E. $\frac{1}{2}$ E., being under complete command; that, having passengers on board, and knowing that many inward-bound steamers would pass near, the master considered it his duty to display signals for assistance; in the first instance, guns being fired and rockets sent up; that both the anchors were kept in readiness to bring up, if necessary, during the night; that an ensign was run up at the peak, but none was hoisted at the main-mast head; that about 4 o'clock, when The Blenheim came alongside her, The Nimrod having then good steerage way on her, Pile, the master, asked the master of The Blenheim to give them a tow, to which he assented, and warps being secured, the time in getting them on board not exceeding a quarter of an hour, The Nimrod was taken in tow, she being then three or four miles to the N. of the buoy off the Constable Bank, * where there [* 572] was upwards of six fathoms water, and that she was in tow of The Blenheim three hours and forty minutes. It denied the averments in the act as to the peril of The Nimrod, and alleged, that, if she had been in any danger, the larboard paddle-wheel might have been worked with ease, the steam having been kept up, and she could have made headway to the windward easily, working only the one paddle-wheel.

The material allegations in the answer were denied by the owners of The Blenheim in their reply.

Addams and Bayford, Drs., for the salvors.

Robinson and Twiss, Drs., for the owners.

DR. LUSHINGTON. This is an action of salvage brought by the owners, master, and crew of The Blenheim, a steamer, against The Nimrod, also a steamer. The value of the property is agreed to be 19,000*l.*, and this is almost the only fact which is agreed to in the cause, issue being taken on nearly every other statement on one side or the other, some of these issues involving points of local, nautical, and mechanical knowledge, upon which it has been a very difficult task to decide, looking to the evidence before me, and with the limited knowledge I possess as to some of the questions. For this reason it was I took time to consider my judgment.

It appears that The Blenheim, with one hundred passengers and a valuable cargo, was on her voyage from Belfast to Liverpool; that about 2 A. M., of the 18th April, 1849, lights were seen on her star-board beam; that Gowan, the master of The Blenheim, then altered

his course, and steered towards the lights, and approached till within eleven fathoms water, and about the distance of two miles from the vessel he was coming to. It is admitted on all hands that these lights were signals of distress shown on board The Nimrod; but there is a dispute as to how many lights, and of what kind the signals were. It appears to me that this question is of very little importance in the cause, because, I apprehend, that signals of this description are held out to be seen, in order to cause vessels to come and render assistance, and it is admitted that these lights were signals [* 573] for assistance. It * is further alleged, that it was impracticable for The Blenheim, in the then state of the weather, to approach closer; so she lay by till daybreak, which, on the 15th April, was between four and five in the morning. At that time The Blenheim came alongside The Nimrod; and on behalf of The Blenheim it is said that The Nimrod was rolling very heavily, and driving broadside on into the bay, on the west end of Hoyle Bank. Whether this averment be true or not, will form not an unimportant consideration in the determination of this case. With some difficulty they got two hawsers on board of her, took her in tow, and reached Liverpool about half past 8 A. M. on the 18th April.

The two main grounds, on which a large rate of salvage is claimed, are, first, that The Nimrod must, without such assistance, have gone on shore in the bay, because her sails were only of use to keep her steady, but were not powerful enough to propel her, there was no anchorage-ground, and her anchors were insufficient to hold her; second, that The Blenheim, in approaching so near; incurred very great risk and peril, by reason of the weather, and the dangerous locality.

As the main ingredients of all salvage services are the danger to the ship salvaged, and the danger to the ship which is the salvor, I must of necessity form some conclusions on the questions I have stated.

On examining the statements made on the part of The Nimrod, it will be found that all the averments already referred to are contradicted, and another and a different set of facts brought forward. According to this version, The Nimrod, being upon a voyage from Liverpool to Cork, when off Point Lynas, about 10 o'clock in the evening of the 17th April, the shaft connecting the two engines broke; the starboard engine was disabled; the larboard engine might have been worked: upon this fact issue is taken. It is then said that sail was set upon The Nimrod, and she was wore round to N. and E. As to the weather, on the part of The Nimrod, it is said there was a strong breeze from the N.,—not a gale from N. N. E.;

that The Nimrod headed E. by N. to E. by N. $\frac{1}{2}$ N., making for the N. W. Light-ship, and made good a course, allowing for lee-way after the flood tide, at 1 A. M., of S. E. * by E. $\frac{1}{2}$ [* 574] E. It is also said that the anchors were sufficient and in readiness; that a little before 4 o'clock The Nimrod, instead of being in eleven fathoms water, was in seventeen, and at the period when The Blenheim arrived, The Nimrod, having good steerage way, was proceeding on her course to Liverpool. It is further said that The Nimrod was at least three or four miles to the N. of the buoy off the Constable Bank, and the depth of water thereon was amply sufficient at the period for approaching and going over the bank. The Nimrod's course is said to have been E. $\frac{1}{2}$ S. to E. by S. All danger is denied to either ship, and it is said that at midnight the wind moderated and the sea went down.

On examining further, I find that, in the reply, issue is taken on all these facts, as to the engines, the sails, the wind and sea, and the course is said to be not to the Light-ship, but the West Hoyle Bank; that The Nimrod was one hour and a half before she would wear round to the N. and E., during which time she was nearing the shore, drifting to leeward. It is said that the course from the place where The Nimrod was taken in tow, namely, Great Ormes Head bearing W. and by N. distant four miles, was S. E. and by E., which would have taken the ship on the Rhyle Flats. It is further said, that the anchors could not hold in a sandy bottom, having no flukes; and being too small, and that the depth of water is erroneously stated; and there is a conflict as to where The Nimrod was when taken in tow. Then follow a denial that The Nimrod could have got into Molfre Roads or Beaumaris Harbor, and an averment that the course pursued was E. and by N. and E. N. E. when the breakers of the buoy on the Constable Bank were seen.

Now I am bound, under these circumstances, to look at the evidence narrowly and carefully; and the evidence by which I am to determine all these questions consists of fifteen affidavits on the part of the salvors, and twelve on the part of the owners.

First, then, as to the degree of danger in which The Nimrod was placed by the accident which happened to her machinery,—the breaking of the intermediate shaft connecting the two engines. On the part of The Blenheim, it is * said, that both [* 575] engines were wholly disabled by this occurrence; on the part of The Nimrod, that the larboard engine might have been easily worked, had there been occasion for it, and that the steam was kept up until morning.

The evidence is entirely conflicting. Mr. Grantham, a civil en-

gineer, swears that he examined the engines, and that they were both rendered useless, and he states his reasons. The opposition to these conclusions is the evidence of Mr. McConochie and Mr. Blaikie, both engineers of experience, both well acquainted with these very engines, and they depose, after circumstantially stating the facts and their reasons, that the larboard engine might have been used.

Now what possible means have I for judging between these statements? How am I to test this evidence? Of course, I cannot say whose is the best opinion, nor can I form from the mere statements of the fracture any conclusion of my own as to its effect, nor could I rely upon the evidence of an engineer unless he saw the engine. Under these circumstances, I must of necessity draw my conclusion from the other circumstances of the case.

Whatever description I take of the wind, the weather, and the locality where the accident occurred, I think that the expediency of removing the vessel from that locality, and getting her into some place of perfect safety, (which could not reasonably be predicated of the place where she lay,) was so apparent, that it was the duty, and must have been the inclination, of the master of *The Nimrod*, to have used the larboard engine for that purpose, could it have been used immediately and with facility. The absence of all attempts to use the engine when signals of distress were made and passengers were on board, satisfies my mind, that, in the opinion of the master and the engineer on board *The Nimrod*, the larboard engine could not have been worked without delay, and with safety and effect. I need not go the length of saying that that engine was totally disabled; it is not necessary in this case to do so.

The next point for consideration is, whether, the engines being practically useless, *The Nimrod* was drifting upon a lee-
[*576] shore, * and must have gone on shore, if assistance had not been rendered to her. This question depends on the weather, the existence of anchorage ground, the quality and power of the anchors, and the set of sails.

It is not denied that there was anchorage-ground in the neighborhood; and from the best information I can obtain, I believe that there was fair anchorage-ground in that vicinity. But of that, of course, *The Nimrod* could not effectually avail herself, unless she had adequate anchors; and here again is a strange conflict of evidence. Mr. Mackie, who is a surveyor of shipping to the Liverpool Marine Assurance Company, swears that the anchors of *The Nimrod* were too light, and of bad form. There are other affidavits to the direct contrary. I cannot help thinking that there may be some

difference of opinion as to the proper shape and make of anchors at Liverpool,—some preferring the pickaxe form, and others a different form. But I cannot enter into questions as to the shape of anchors. The *Nimrod* had five anchors on board, two of fifteen cwt. and three smaller ones. It is contrary to all probability that a vessel engaged in carrying passengers and freight from Liverpool to Cork should be wholly unfurnished with sufficient anchors and chains, and where I have to decide upon direct evidence so conflicting, it is by such circumstances my judgment must be governed. I conclude, therefore, that for all ordinary purposes, in all ordinary weather, the anchors and cables were sufficient for the use of the vessel and for her safety.

But I should say, there is a very strong affidavit on behalf of the owners from Mr. Green,—and I must take it that he is a person of ability, being surveyor of steamers,—and he says: “I am decidedly of opinion that the first-mentioned anchor and chain of *The Nimrod* would alone be sufficient to hold her in a gale of wind, in an open roadstead.” Supposing this evidence to go a little beyond the facts, still it is very strong testimony in support of the conclusion to which I have come.

Now, as to the sufficiency of the sails, I think the evidence clearly preponderates in support of *The Nimrod*’s averment, that the set of sails were efficient; not so much so as sails * for [* 577] sailing-vessels, but sufficiently so for common and ordinary purposes.

Then what was the state of the wind and sea? It appears, that towards the end of the night of the 17th, and the early part of the morning of the 18th, the wind blew more strongly, and there was a heavier sea on. I again say, it is quite impossible to reconcile the evidence, or to tell with certainty whether the wind blew a little from the E. of N. or not; but I am of opinion that there was not, at the time when *The Blenheim* took *The Nimrod* in tow, a strong gale from the N. E., nor was the weather boisterous.

An affidavit on the part of the salvors is not unimportant for this purpose; it is the affidavit of John Jones, a master of the *N. W. Light-ship*, with an extract of the ship’s log annexed, whence it appears that, on the 18th April, at 1 o’clock, the wind was N. N. E., “strong breezes and clear;” at 3 o’clock, “moderate breezes and cloudy;” at 5 o’clock it was N. E., “fresh breezes and cloudy,” and so until 7 o’clock.

Having, to the best of my judgment, formed my opinion on these points, I now approach the question to which all these inquiries tend: Was *The Nimrod*, when *The Blenheim* came to her assistance, in imminent danger? Was she in danger of drifting on the

shore and of becoming a wreck? I answer that question in the negative, bearing in mind the state of the weather and the locality. I cannot bring myself to think that the breaking down of the engines is generally attended with so very great danger as is represented; it may be so where other circumstances concur; but it is an accident of no very unfrequent occurrence, and not, as I believe, generally attended with such fatal consequences. Were it otherwise, I doubt if travelling by steam-packets would be so universal.

I am, therefore, of opinion, that, supposing the wind not to have increased, The Nimrod might have anchored with a reasonable prospect of safety; secondly, that, in the then state of the wind and weather, she might, at daybreak, have been taken to Beaumaris.

I am fully aware that these are nautical questions, on [* 978] which my judgment may be very liable to error; but neither party thought fit to request the attendance of Trinity Masters, though fully as necessary in this case as, if not more so than, in most cases of damage. I have, therefore, been left entirely to my own resources, aided by such nautical advice as it was in my power to obtain. I think there was no necessity for The Nimrod to attempt to enter Beaumaris in the night-time, neither do I think that there was at daybreak a fresh gale from N. N. E., to prevent her entering that port. It is on the supposition of such facts that the affidavit of Lieutenant Lord is founded, and unless the facts are as supposed, the conclusion falls to the ground. It is utterly useless to produce such affidavits as this, from persons who, not having been present, form mere opinions upon facts laid before them, and draw hypothetical conclusions. Generally speaking, hypothetical affidavits are utterly useless. There may be cases in which it is desirable to have the affidavits of persons possessed of local knowledge, to instruct the mind of the court, in cases where Trinity Masters do not attend: when they do attend, the necessity for affidavits of that kind is superseded.

Being of opinion that The Nimrod was in no immediate danger of destruction, I still think that she was in a condition which rendered assistance most desirable; if the weather had become more boisterous, actual danger might have occurred, although she was in no immediate danger.

With regard to The Blenheim, there may have been some difficulty, though not very great, in getting the hawsers on board; but I think she was not placed in any danger whatever from any cause. She was in perfect trim, and I think that the representation, that she incurred danger from approaching the locality where The Nimrod was, is utterly and altogether unfounded. What was to prevent her

from approaching the locality ; and what chance of danger could she have incurred in nearing The Nimrod ? The only chance of danger was that of the two vessels coming in collision.

The service is undoubtedly one of merit, and should be duly rewarded. I do not leave out of consideration the great value of The Blenheim and her cargo, and that she had *a [*579] large number of passengers on board. The service lasted, commencing with the period when The Blenheim altered her course till the time of reaching Liverpool, from 2 o'clock in the morning until 8, or about six hours. Part of this time was occupied in towing The Nimrod up the river Mersey.

I am of opinion that the claim made of 8,000*l.*, (bail being taken for 6,000*l.*,) is most exorbitant, and I think many of the statements of the salvors most exaggerated. I think 600*l.* is an ample reward for a service, which, though valuable in itself, entailed no risk, or loss, or great labor upon the salvors. Adequate rewards encourage the tendering and acceptance of salvage services ; exorbitant demands discourage their acceptance, and tend to augment the risk and loss of vessels in distress.

THE IMMAGANDA SARA CLASINA, Zoetelief.

Cause, by Act on Petition.

May 14, 1850.

Collision. A vessel close-hauled on the starboard tack, apprehending a collision with another vessel sailing free, at night, having, in order to ease the blow, starboarded the helm, held to be to blame. Difference of opinion between the two Trinity Masters.

THIS was a cause of damage by collision brought against the Dutch ship Immaganda Sara Clasina, by the owner of the British bark New Forest, against which a cross-action was brought by the owners of the Dutch ship.

The act on petition, on behalf of the owner of The New Forest, alleged, that on the 17th January, 1850, she had arrived off St. Catherine's Point, Isle of Wight, on her voyage to South America, the wind being N. N. E. ; that on the following morning, the wind shifted to S. by W., and came on to blow heavily, when the bark, which had

reached down to the Start, was driven back, and continued to beat about against an adverse wind until the evening of the 19th, when, at half past seven P. M., about five leagues from the Wight,

[*583] standing to the W. S. W., close-hauled on the *starboard tack, the wind blowing fresh from the N. W., it not being so dark but that vessels could be seen at the distance of a quarter of a mile, a good look-out being kept, the Dutch ship was seen standing up Channel, with the wind several points free, about two points on the bark's weather bow, and approaching her; that thereupon the carpenter held up a brilliant signal-lantern from the fore rigging, on the starboard side, while the watch loudly hailed the Dutch ship, but no answer was returned by her, and no alteration was made in her course, until she came within a cable's length of the bark, when her helm was ported, but too late to prevent a collision; that, in order to ease the blow and save the bark from destruction, the carpenter called to the man at the helm to starboard, which was instantly done, and the bark answered her helm, but in less than a minute, the ship ran stem on into her, doing her very considerable damage; that the bark, in a crippled state, was compelled to stand for Southampton, where she arrived on the 21st; and that the collision was imputable solely to the misconduct of those on board the Dutch vessel, in not bearing away and keeping clear of the bark.

The answer, on the part of the owners of The Immaganda Sara Clasina, alleged that she was on a voyage from Batavia to Amsterdam, in which she had experienced tempestuous weather, and on the 18th January, entered the British Channel, the wind S. W. by S., shifting on the morning of the 19th to W. N. W.; that at half past seven P. M. of that day, all hands being on deck, and a strict look-out being kept, The New Forest was seen a short distance ahead, rather on the larboard bow, but from the haze and darkness it was at first uncertain whether she was proceeding up or down Channel, but the mate instantly called out, "Port, hard a-port," and the man at the helm immediately put it hard a-port, and she began to bear away rapidly; that a light was exhibited over the ship's larboard bow, but no light was seen on board the bark, nor was any hailing heard from her; that the bark, instead of keeping her course, put her helm to starboard at the same time that the ship's helm was put to [*584] port, which brought the bark across the *ship's bows, doing her considerable damage; that the ship was towed into Portsmouth harbor on the 20th; and that the collision was wholly attributable to carelessness or want of skill on board The New Forest, in starboarding her helm instead of keeping their course.

The court was assisted by two elder brethren of the Trinity House.¹

Addams and Twiss, Drs., for the bark.

Jenner and Bayford, Drs., for the Dutch ship.

DR. LUSHINGTON. The proceedings in this case originally commenced by an action of damage being brought by the owners of The *New Forest*, a bark of 157 tons, against The *Immaganda Sara Clasina*, a Dutch ship of 769 tons, followed by a cross-action. The bark was on a voyage from London to La Plata; the Dutch vessel from Batavia to Amsterdam; one was coming down the Channel, the other up. The collision took place in the Channel on the 19th January, about five leagues from the Isle of Wight, and about half past seven o'clock in the evening. At that time, the bark was standing to the W. S. W., close-hauled on the starboard tack, the wind blowing fresh from the N. W. The night was not particularly dark; vessels could be seen at the distance of about a quarter of a mile. At the same period, as is alleged, the Dutch vessel was descried about two points on the bark's weather bow. The Dutchman was coming up Channel, on the larboard tack, steering about N. E. There is no essential difference as to the quarter whence the wind blew. The Dutch vessel was going free.

Under these circumstances, what ought to have been done by each vessel respectively is abundantly clear, provided, of course, that nothing occurred to render the ordinary rules of navigation impracticable: it was the duty of The *New Forest* to keep her course; of the Dutch vessel, to port her helm and give way. The *New Forest* starboarded her helm; and one question is, whether she was justified in so doing, *and departing from the general [*585] rule of navigation. It is alleged, that the necessity did occur, and that the helm was starboarded only to avoid a collision that would have been more destructive, and that such necessity was occasioned by the delay of the Dutch vessel in porting her helm.

Certainly, if such a necessity did exist, no doubt can be entertained that the starboarding the helm was justifiable, for it is a mere truism to say, that no man is bound by a technical rule to submit to the destruction of life and property; but the *onus probandi* is upon

¹ Captain Hayman and Captain R. Gordon.

the party so deviating from the general rule, and the question here is, whether there is any proof of the necessity; and this is a question of evidence, and it necessarily includes the evidence on both sides.

It does not appear from these proceedings who was in charge of The New Forest at the period in question. The master was below: no mention is made of the first mate in any part of the proceedings: the second mate was at the helm; the carpenter, Adamson, keeping a look-out. I must presume, or rather conjecture, that the second mate was in charge, though at the helm. It appears that some one of the watch descried The Immaganda Sara Clasina, and that the carpenter held up a signal-lantern, and that they all hailed the ship to keep clear, which brought up the master and rest of the crew of the bark. It is said that the Dutch ship did not port until within a cable's length of the bark, and that then the carpenter, (not the master,) ordered the helm of the bark to be starboarded.

This case was heard before Trinity Masters, and I went out with them for the purpose of consulting what would be the right judgment to give. The Trinity Masters and myself concur in opinion, that this measure of starboarding the helm of the bark was erroneous, and not justified by the circumstances of the case, even upon the statement of the bark herself. The bark ought to have kept her course, or ported her helm, in which case, even at the distance stated by the bark when the ship first ported, in all probability, no collision would have taken place. The bark, therefore, was to blame.

[* 586] * But there is another question, namely, whether the Dutch ship was also to blame; whether, though she pursued the right measure in porting her helm, it was not done too late, either through an insufficient look-out, or some other cause.

The court is greatly indebted to the Trinity Masters for the strict attention they paid to this question, and for the candor with which they declared their opinion. It has happened, as must occasionally occur, where honorable men have to form opinions upon difficult questions, that they do not agree. One gentleman is of opinion that there was an unnecessary and blamable delay in porting the helm of the ship; the other thinks that no such delay is proved. My first impression was, that there must have been some negligence or delay on the part of the ship; but, having carefully and painfully reconsidered the case, I have satisfied my mind that there is no adequate proof of any culpable delay on the part of the ship. I must, therefore, pronounce that the bark alone was to blame for this collision. I think that the collision arose from the mistake of Adamson, in ordering the bark's helm to be starboarded, and that the ship did

port her helm in time to have prevented a collision if the helm of the bark had not been starboarded. The ship came round from N. E. to S. E. and exhibited a light on her larboard bow.

SUPPLEMENT.

IN IRELAND.

* THE HEBE, GOOS.

[*1]

Libel.

April 20, 1849.

Salvage. Services of a very meritorious character rendered to a foreign ship in great peril.

THIS was a cause of salvage, promoted by Richard Edwards, commanding officer of the coast-guard, stationed at Ballycotton, in the county of Cork, on behalf of himself and the boat's crew acting under his orders; and also by the registered trustees of the steamer Sabrina, of Cork, and by the master, officers, and crew of the said steamer, for alleged services rendered to this vessel, and getting her out of Ballytransa Bay, an open, rocky, and exposed place, and towing her to Cove Harbor, upon the 27th of December last.

To this libel, exhibited 5th February, 1849, a matter contrary and defensive was pleaded on the 5th of April following, setting forth in substance the ability of The Hebe to have extricated herself, by ordinary means and the exertions of her own crew; the small amount of salvage service rendered; and making a tender, upon the acts, of 50*l.* to the coast-guard, and 250*l.* to the trustees and master and crew of The Sabrina.

An interventional libel was also exhibited on the 23d of March, upon the part of Messrs. Pandia Balli and Eustratio Balli, trading under the name and style and firm of Balli, Brothers, London, as holders of a bottomry bond to the amount of 1,850*l.* 6*s.*, which had been executed by Gustaff a Goos, the master of The Hebe, in favor of Thomas Balli, of Constantinople, for so much money, including maritime interest, advanced by him, on the 21st of October, 1848, O. S., to the said master, on bottomry, The Hebe being then at that* port, and laden with a cargo of wheat, destined on [*2]

a voyage from Odessa to Cork or Falmouth, for orders, and the master being without funds or credit.

The execution of this bond to Thomas Balli, and his indorsement of it to the intervenients, were admitted on the acts of court, and, subsequently, an affirmative issue was entered to those articles of the intervenients' libel, which alleged the other matters in the case.

The value of the ship and cargo was taken at 4,000*l.*; the tender of 300*l.*, which had been offered, was rejected.

The case was argued by *Radcliffe, Townsend, and Butt, Drs.*, for the salvors.

Kelly and Gibbons, Drs., for the holders of the bottomry bond.

Gayer and Hayes, Drs., for the owners.

DR. STOCK. The facts of this case appear to me to be of a strong and well-defined character, and little liable to misrepresentation, and the court, therefore, does not find much difficulty, (by the light of those facts,) in assigning to the salvage services rendered to the impugnant ship *The Hebe* their proper rank and place in the scale of such merits, as that scale is now pretty well adjusted by a very long and numerous series of reported cases.

There is at present in the registry of the court, subject to adjudication, in this cause, a sum of 3,000*l.*, being a portion of the proceeds of the sale of the cargo of *The Hebe*, and there is 960*l.*, the estimated value of *The Hebe*, making, together, 3,960*l.* Large disbursements have besides been made, (and I believe very properly made,) out of the property, by the marshal, towards the necessary and unavoidable expenses of unshipping a part of the cargo of corn at Cove; also in the storage of the corn, and afterwards in the applying of those processes for the preservation of the damaged grain, without the prompt and effectual employment of which the goods must inevitably have been a total loss. These disbursements, though extremely heavy and onerous to all concerned, are not more than were indispensable; and, as the immediate effect of the strenuous

[*3] course of operations resorted to for the securing of the cargo was a benefit not merely to the owners and creditors, but also to the salvors, I think, according to the practice established here, these expenses ought to be borne according to a fair proportion by the salvors, in common with the owners. Making just allowances, therefore, I have to observe that the fund equitably subject to the demand of the salvors is not less than 4,000*l.*; that is the *minimum*, and is indeed a calculation founded on a liberal considera-

tion of the circumstances of the property, and indulgent towards the part of the owners. It is totally unnecessary for me to remark that some debts and liabilities, which appear to be liens on the ship and cargo, and mentioned in the course of the argument, are of a nature not to be at all brought into account, when we are measuring the amount of the fund justly chargeable to salvage. Of such nature is the bottomry bond for 1,800*l.*, which was given by the master of The Hebe at Constantinople; such, also, are the debts contracted on account of provisions, or other necessities, for the crew, in Cove or Cork, or the sums which may have been taken up on credit to supply these Swedish mariners with the means of returning to their country. Such liabilities form no just or fair item of deduction from the gross amount of the fund properly and originally liable to the claims of the promovents in the salvage cause; for the salvage in question has been the very means, under the direction of Providence, that any such value is now forthcoming for the satisfaction of these debts of the owners; debts in so high a degree obligatory on their faith and conscience.

Taking into consideration, then, that the fund affected by the salvage claim is, upon a moderate estimate, 4,000*l.*, I am to decide whether the two several tenders made in the acts, on the part of The Hebe, in satisfaction of the services rendered by Edwards and the volunteer fishermen, his companions, and in satisfaction of the claims of the Cork Steam Company and Captain Parker, are respectively adequate and sufficient tenders. The tender to Edwards and his company is 50*l.*, and the tender on foot of the services of the steamer amounts to 250*l.* If the court were to rule that * either of these tenders had been a good and sufficient ten- [* 4] der, that decision would bar and extinguish the claim of salvage persisted in after the tender made, in so far as regards the party to whom such adequate and sufficient tender had been made. And if the court ruled that each tender was good and sufficient, then the whole claim for salvage, as libellate, including both the share of the steamer and the share of the whaler, would be barred and extinguished; and the parties respectively persisting in the suit, after such adequate and sufficient tender made, would be entitled to no more than the amount of the sums lodged under the tenders, and would moreover be subject to the costs of the suit since the day of the tender. On the other hand, a tender, though it may be finally overruled as insufficient, is always an act discovering, to a certain extent, good and sincere intentions on the part of those who make it. It operates as an admission of merits, and is so far evidence of fair dealing and candor, as well as of a sense of gratitude

on the part of those who thus evince the purpose of accepting a real service in an amicable spirit. Accordingly, whenever, a tender is not illusory,—is not so much below the true merits of the claimant as to be transparently a mere pretext,—it ought not, in my judgment, to operate unfavorably to the case of the impugnant; but, on the contrary, I am disposed always to deal with *bonâ fide*, though inadequate, tenders, as important indications even in respect to the substance of the case.

The facts of this case may be briefly summed up. The Hebe is a bark of about 500 tons burden, belonging to the port of Björnåburg, in Russian Finland, situate on the coast of the Gulf of Bothnia. She had made the longest voyage, which, within the limits of Europe, it is perhaps possible for a ship to do, that is, from a port in the Gulf of Bothnia to Odessa, on the shores of the Black Sea at the mouth of the river Borysthènes. At Odessa she took on board a cargo of wheat, and proceeded on her return voyage. Early in the course of the return she was destined to suffer a beginning of mis-

fortune, for, in the port of Constantinople, (I presume [* 5] owing to the casualties of the outer-bound * voyage, or to some accidents in the run from Odessa,) The Hebe was obliged to undergo repairs, and to that end took up a large sum on bottomry. She now prosecuted her voyage, bound in the first instance for Cork or Falmouth, to receive ulterior orders at one or other of those two ports. Having been for some time on the coast of Galicia, in Spain, not without some further disastrous experience of the perils attendant upon her circumnavigation of the European continent, at length, about the 22d of December, 1848, she made the Agnes light, in the Scilly Islands, then distant sixteen miles, and bearing east quarter south. She was at this time in the chops of the English Channel, endeavoring to beat up against baffling winds, so as to make the port of Falmouth; but, however it happened, she failed in gaining that port, and her master, M. Goos, took the resolution of putting the vessel's head about, and bearing for Cork, the wind having set in from the eastward and southward, and, therefore, rather favoring a run for Cork. Three days after, on Christmas day, The Hebe came in sight of the lights at the entrance of Cork harbor, bearing five miles distant, at eight o'clock in the evening. The weather had then become very bad and foul, the wind continually increasing; and it is little to be wondered at, therefore, if, so late in the evening, and particularly on Christmas day, they had the misfortune to miss of a pilot. Captain Goos, as a stranger to the coast, declined the risk of attempting to enter the harbor in the dark, and, there being now a hurricane of wind, he reefed his sails, and endea-

vored to preserve himself during the night, beating off the land. A south-west wind, however, carried him forcibly past Bere Head, towards a very inhospitable shore and a most dangerous locality, eastward of Bere Head, and between that point and the point of Ballycotton Island. It is a place called Ballyandrina, a circumflex or indenture of the coast, called by courtesy a bay, but in fact an open and exposed shore, full of sunken rocks and reefs, and totally destitute of shelter or safe anchorage. On this part of the coast, described as the wildest creek in the county of Cork, and about a mile and a half west of Ballycotton Island, The Hebe was driven in the course of the forenoon of the 26th of Decem- [* 6] ber. She had been for several days before in a leaky state, and water was making fast in her hold. The weather was at this juncture most tempestuous, and under her lee was presented an iron-bound coast of rocks, directly down upon which the force of the wind was bearing the ship. About noon, on the 26th, Captain Goos dropped both his bower anchors, but the ship dragged, and her destruction appeared almost inevitable. Her mainmast and foremast were then cut away, and this operation happily produced the desired effect, for in a few minutes the dragging began to cease, and the ship held by her anchors. Still the position of this vessel cannot be described as any thing less than formidable; she was exposed to the beating of a most tremendous surge, environed with breakers and dangerous sunken reefs, and embarrassed with the wreck of her masts, spars, and rigging, which hung by her side, and, before they could be cut away and cleared off, had already caused great additional injury to the vessel, by collision, and had further opened the leaks and shaken the framework of The Hebe. At length they cleared away this dangerous gear, and, immediately after the wind abated somewhat, so that the first and chief salvor in this cause may truly be said to be the Providence of the Almighty, without which, escape from a most disastrous shipwreck would seem to have been almost impossible. On shore, too, appearances were equally menacing. The populace had armed themselves with hatchets and saws, and were prepared, I fear, to give the crew no very humane reception.

At this period of time, the promovent Edwards took the initiatory measures needful towards an attempt at rescuing the lives and property involved in this state of extreme and nearly desperate peril. All the steps taken by Edwards appear to me to have been proper and judicious. He was the commanding officer in the revenue department at Ballycotton; and I should do him wrong if I did not state, that it is the decided opinion of this court, that, throughout the

whole of the transactions connected with the salvage of *The Hebe*. Mr. Edwards has displayed as much cool judgment, energy, humanity, and courage, as could under the circumstances be expected. [*7] tinguish *the conduct of any individual whatever. The precautions taken by Mr. Edwards, in sending for a steamer to Cove; in collecting the best force of constabulary, and even military, from the adjacent stations which he could at the moment obtain; in the effective protection he was prepared to throw around the foreign crew, in case of their getting safely on shore; in the prompt, and to a certain extent, successful rescue of the rafted materials which were floating in to shore, under the eye of a most determined mob of wreckers; I say, in all these respects, but, above all, in the generous and gallant succor he was bent on giving, at the hazard of his own life, in his adventurous attempt to get out by boat to *The Hebe*; I do, in all this discover every characteristic of the zeal which, whenever it occurs in a case of salvage, is justly the subject of eulogium, and ennobles the records preserved in these courts with the genuine features of humanity and intrepidity. It is said that Mr. Edwards is not a regularly bred mariner; now if it were so, and that he were little accustomed to the face of danger at sea, so much the more would it redound to his honor, that confronting and subduing fears and apprehensions, necessarily magnified to his mind by that inexperience of their nature which all novelty implies, he was willing, for the sake of preserving the life of his fellow-man, to put his own existence in immediate jeopardy. But I see no ground for this imputation,—though I think it little material one way or the other,—on the professional skill and competency of Mr. Edwards in marine affairs. He was evidently quite able to take and hold the command of the volunteers, who on this occasion consented to go out with him to sea. He did command, and he steered the boat in his dangerous course round Ballycotton Island. It is sufficient to the court, that it appears he was well qualified to conduct the operations which he undertook, and that, so far as knowledge in maritime affairs was necessary on this occasion, that knowledge he certainly possessed.

The wind had shifted a little towards noon, and it gradually abated from thence throughout the day and up to midnight. Captain Hore, of the royal navy, had stated exactly the variations [*8] tions *of the weather throughout the day, and I collect from his evidence, that, before evening, there was no longer any foul weather, such as to occasion danger at sea; but Captain Hore also distinctly admits, that, though the weather was fair, the sea was not safe, the swell continued, and in the sailor's phrase, I

think, Captain Hore has given decisive testimony to the fact, that, at no time before the morning of the 27th of December, could an attempt to board *The Hebe* by a row boat from the shore have been regarded as any thing else than a hazardous undertaking,—his expression is this: “he should not have liked to have been out that night in a row boat off Ballycotton Island to seaward;” in fact, he fully admits it was a case of danger.

It is alleged by the promovents, that the boat put off from Ballycotton Pier at one o'clock in the morning, and that they were occupied in the passage out from four to five hours. This is denied on the other side, and the matter is argued as if this were a statement in the teeth of all probability, merely for the purpose of magnifying the difficulties and hazards undergone. I find, however, that the time of the departure from Ballycotton Pier is most positively sworn to by the three men of the boat's company who have been produced in support of the libel; and, undoubtedly the other point of time, namely, the time of their arrival alongside *The Hebe*, is established by incontestible evidence. A little before five in the morning of the 27th, they came alongside; this, the master of *The Hebe*, Captain Goos, himself admits. Now, in stating this, Captain Goos further adds, that the men in the boat, immediately on coming aboard *The Hebe* declared that they had been five hours working out from shore, and had undergone hardship and exposure. I think this very material towards establishing the accuracy of the evidence as to time. It shows this is no afterthought, or newly made-up story, to meet hints and suggestions of professional or other advisers; it was what the men stated and asserted at the instant. Besides, if this allegation as to the time of the commencement of the salvage were untrue and inaccurate, nothing could be more easily disproved,—there were plenty of witnesses at hand. The country people, it appears, * did not disperse, at least all, during the whole night, [*9] and unquestionably Ballycotton Pier was far from being a deserted spot at the moment when the boat was launched. Can I reasonably doubt that the three salvors produced have sworn truly as to the time? Can I take them to be perjured on this matter of fact, the most readily open to contradiction, perhaps, of any one point in the case? Certainly not. I am satisfied that the *animus* of these sailors was excellent; that they were full of zeal and enthusiasm, and bent on turning to the best account the opportunities of time and weather, the moment such opportunities were first placed within their power.

Now, there can be no doubt that this attempt of the men in the whaler is entitled to high commendation, as a bold and adventurous

case of salvage. The aim, beyond question, was that high aim, the highest and purest known to the law of this court — the desire of preserving life endangered at sea. Neither have I any doubt that the salvors knowingly put their own lives in peril, and were in the course of the passage exposed to some considerable and actual danger. And was there not a most substantial and valuable object in view, the neglect of which might not indeed be criminal, but the achievement of which was in a high degree meritorious and honorable? In my judgment, there was such an object to be gained. What was it? Why, to become the guardians of the crew of *The Hebe* against such ill-advised attempts at their own extrication as, in the circumstances of danger to them at that time unknown, but nevertheless real and on all sides surrounding them; to guard them against the attempts they would have probably entered upon, prematurely and perilously, in the hope of making the land.

It is true, I admit, and as Dr. Gayer argued, that the local ignorance of a foreign master, — his want of knowledge of the coast, — is no ground on which pilots or others can raise a claim of salvage: that is to say, such ignorance cannot solely and alone confer on those who come to the assistance of it, by offering the necessary advice and instructions, a right to graft thereon pretensions to the

[*10] character of salvors. * But this is only when the value of the advice given is simply and merely the value which belongs to pilotage. It is another case, if a ship be beleaguered with concealed and manifold dangers, and, by a prompt and courageous effort, information is brought out from land, in consequence of which fatal mistakes and rash counsels on the part of the endangered ship are anticipated and prevented, and the way of safety first opened to the crew. It is clear, I think, that when Edwards came up, the master and crew were already bent on preparation for quitting *The Hebe*, and for endeavoring to make the shore. It is a possible case, but not, I think, a probable one, that the crew might have conceived the plan of rounding Ballycotton Island to the south, in the same course which was taken by Edwards. It is much more probable, that, in ignorance of this line, they would have attempted the lee-shore before them; and, I think, in that case, they would have been placed in a situation of the greatest danger. There was a sunken reef between them and the coast, on which I believe their long-boat must have been swamped. The opportune arrival of Edwards did, as far as I am able to form a judgment, actually interpose between them and this imminent danger. I have no doubt that the deliverance which was thus accomplished was the very object in the contemplation of the salvors; and with this state of facts before my

eyes, can I say that nothing was effectually done by Edwards and his companions? There are in most cases of miscellaneous evidence some indication of the truth derived from the mere light of circumstances, which are even more marking and valuable than the best direct oral testimony. Here was the long-boat, when Edwards boarded, hoisted from her proper berth along decks, and put into a position denoting the intent to launch; here was a bag of biscuits evidently in readiness to stow on board this boat; and here was a mate and crew jointly and in a body remonstrating with their captain on the imminency of the impending peril, and asking as a favor that, first in order of time, and before any measures were taken for the securing of the ship and cargo, due care should be applied to the more momentous concern of saving human life; that the * boat should be in readiness first, and that then, with a [* 11] reasonable alacrity, (their own safety being provided for,) the crew would go to work in performing their duties towards the property.

From five o'clock in the morning till about eight or nine, Edwards and his party were assistant to the crew of *The Hebe* in the labor of heaving the anchors. I do not pass over the risk and inconvenience sustained by these hardy and enterprising men in boarding *The Hebe*, and I see abundant matter to applaud the untiring energy and intrepidity with which they encountered every difficulty. At nine, whilst considering of the measures to be taken to move the ship from her very unpleasant situation, — whether by a jury-mast, or by towage, or both together, — they were suddenly relieved from all further care by the appearance of *The Sabrina* steamer, under the orders of Captain Parker, which at that time hove in sight, rounding Bere Head. This is a powerful steamer, of the value of 23,000*l.*, in the service of the Cork Steam Company. She was bound to Bristol, with a cargo worth more than 2,000*l.*; a crew of twenty-five hands and three cabin passengers. She left Cork that morning about six o'clock A. M. She left Cove two hours after, or at eight in the morning. At Cove, Mr. Scott came on board *The Sabrina*, announcing the intelligence to Captain Parker, that a large ship had been on the coast, near Ballycotton, but dismasted and in distress, since the forenoon of the preceding day. Captain Parker decided to repair to the spot, and make a tender of his services. This occasioned a small, and but a very small, deviation from his course. At ten o'clock, *The Sabrina* neared *The Hebe*; the steam was slowed, and Captain Goos, accompanied by Mr. Edwards, went to the steamer. Captain Goos, as he was in duty bound, endeavored to place the salvage of his ship on a footing of contract; in fact, to bar-

gain for the price of a towage service to Cork. If it was the duty of Goos to invite Parker to a negotiation, it was equally and undoubtedly Captain's Parker's duty to decline being bound by any specific agreement. Clearly, the situation was not such as left an [*12] option of treating to Goos. Mr. Edwards * put the matter in its true light; he said to Goos, "You must accept unconditionally; it would be madness in you to refuse the offer of the steamer's service." Goos, in fact, like a well-advised master, at once capitulated; he saw there was no room for parley. Captain Parker's service being thus unconditionally accepted, he backed the steamer towards The Hebe's bows. The reason of manœuvring in this way was, that the distance between The Hebe and the rocks adjacent to the island of Ballycotton was considered to be too small to allow of The Sabrina's passing under the stern of The Hebe between her and the rocks, and so coming round to a proper towage position ahead of the starboard bow of The Hebe. This would have been the proper and usual method of proceeding to throw the towage-line and to link the ships; but a somewhat hazardous course was of necessity adopted on this occasion, by backing The Sabrina to The Hebe, in a very rough and swollen sea. However, the towage line was of great length, and it was carried aboard The Hebe in the boat. With such a seaman as Captain Parker on board The Sabrina, I do not think any of the passengers need have been under the slightest degree of alarm as to the consequences of this manœuvre. The Hebe, being attached, was then towed safely to Cove, where they arrived in the course of the same afternoon.

I am to observe, that, so early as five o'clock that morning, The Hebe had eleven or twelve feet of water, and when arrived in Cove not less than fourteen feet of water in her hold. Already, when she reached the quay of Cove, much damage had been done by the salt water to the cargo of wheat. In prudence, not a moment of time was to be lost in beginning to unlade her, and so urgent was the necessity deemed, that in a very few hours after arrival they ran her aground, adopting that expedient expressly for the purpose of saving the cargo. In the course of the towage, the tow-rope burst, which was a new and valuable rope, worth from 25*l.* to 30*l.*, and for this, compensation is claimed. The rope appears to have been much strained and injured, besides the damage done by the rupture. I

have further to observe, that the towage was, though not [*13] accompanied with * danger or labor, still a tedious and troublesome work. The Hebe lay deep in the water, and was from her dismasted state, and the water in her hold, rather a difficult job for towage. Besides this, Captain Parker lost his voyage,

and incurred a demurrage of twelve hours on the Irish coast, and twelve hours more at the mouth of the Nore.

There is a question raised, whether the steamer was brought up to the assistance of The Hebe by means of the agency of Mr. Edwards, or whether her arrival is not to be attributed to the general rumors current at Cove, of a wreck being at Ballyandrina, without any certain author. There is some importance, I admit, though not perhaps a very great importance, to be attached to the decision of this point. Something is wanting to complete the chain of evidence, which, if Mr. Scott had been examined as a witness, would have probably been cleared up. Still, I think the court is justified in believing, upon the fair import of the facts in evidence, that the application of Mr. Scott for the assistance of the steamer was the direct consequence of the message sent by Edwards to the receiver of droits at Cove. That a message was despatched to Cove, by Edwards, to the receiver of droits there, in the course of the afternoon of the 27th, is certain. Now observe that Edwards, in the course of that afternoon, had secured the rafted materials cut away from The Hebe, which he found floating in the Sound of Ballycotton, which he then moored, and which remained under his custody *in usum jus habentium*. Now, under these circumstances, the Wreck and Salvage Act, 9 and 10 Vict., c. 99, by very express words, and under a very heavy penalty, imposed on Edwards the duty of immediately apprising the receiver of droits at the nearest station of these facts. He was subject to a penalty of 50*l.* in case of neglecting this duty, and stringent provisions are added to enforce upon the receiver prompt attention to such communication. Then, the period of time is short between Edwards's message and the arrival of The Sabrina at Cove,—only the interval of the intermediate night. Thus, there are duties imposed by the statute both on Edwards, as the revenue officer, and upon the receiver of droits, to act in *this [*14] emergency; and I think I can hardly imagine it probable that any mere rumor, in so short a time, could have forestalled the diligence of these officers, acting in their sphere of duty, and that it would be a forced inference to suppose that Mr. Scott did not act in consequence of intimations conveyed through the proper official channels. I think the evidence fully sufficient to bear out my inference, and to warrant me in acting on the ground that Mr. Edwards is, in this part of the transaction, as well as in the rest, the *dux facti*, under whose careful and well-considered conduct this honorable service was begun and brought to a successful termination.

Such, as I have now briefly rehearsed them, are the material facts constituting the history of this case. They are facts, I repeat, of the

most unequivocal and characteristic nature. Not a doubt can remain of this being a complete deliverance of a ship and cargo, by the instrumentality of the salvors, from a situation of multiplied and most embarrassing difficulties. Without the timely arrival of the whaler and her company, there is every reason to suppose The Hebe's crew would have committed themselves to the desperate chances of an attempt at landing, and, without the arrival of the steamer, every probability leads me to believe that the measure adopted would have been to get the ship round to Ballycotton Pier. Consider, in this event, the great loss that must probably have fallen on the cargo. Even at Cove and at Cork, with all the mechanical appliances and all the resources of skilled labor at command, in a commercial emporium, much injury and loss was incurred by the progress of the salt water in tainting the grain. Now, clearly, if she had gone to Ballycotton Pier, either they must have sent to Cove for a steamer, with a ruinous delay in the interval, or they must have attempted to unlade the cargo in that remote and sequestered village. Even laying aside the consideration of the plunderers along the coast, I cannot but conclude that what would have been called the salvage of the ship, in Ballycotton Bay, would have been in truth no salvage at all, at least

so far as regards the value of the corn. I conceive, therefore, [*15] that it is fairly inferable from the evidence, that to the acts of the salvors in this cause is due completely the rescue and realization of the value which has been made available by the sale of the cargo, and that, without the services rendered, there would at this day be no such value extant at all.

Such being the conclusion to which my mind is irresistibly impelled by the evidence, I have not the slightest doubt about overruling the tenders, both the one and the other of which I deem to be inadequate and insufficient. At the same time I am sure those tenders were made in perfect good faith, and as in a choice of difficulties, and they have not been without a certain degree of influence in guiding the court.

Here, then, on the one side, is a case of salvage, which, as a case of deliverance effected, is highly meritorious. On the other side, the property subject to adjudication is not great; the losses and sufferings of the owners in the late disastrous voyage have been great and lamentable. So far as the steamer Sabrina is concerned, no extraordinary claim of merit, other than that of a most opportune tender of assistance can be advanced. On the part of Edwards and his company, there are resolution, gallantry, enthusiasm, and the glorious probability that they have been the saviors of life. But independent of the excellence of their intention, it does not appear that Edwards and

his men had to encounter any very great degree of hardship; it was chiefly the risk of their run to The Hebe at night, before the sea was fully returned to calm, which distinguishes their exertions from common cases. While, then, I have no doubt that I must considerably increase the salvage reward beyond the amount of the tender, I must also carefully guard myself from allotting any excessive sum against The Hebe, under the influence of those feelings, towards the salvors, which their great respectability induces.

I have carefully considered the cases cited in argument with respect to measuring the *quantum* of the salvage. It is truly remarked by Dr. Lushington, in the case of *The Gennessee*,¹ that it is hardly possible to make a precedent * of any [* 16] one case in deciding any other, when the question is the question of money compensation; so infinitely various are the shades of difference which result from the comparison of the details of each particular case with another. I have, however, done my duty to the best of my power in analyzing the different reported cases.

Upon the whole, taking the sum of 4,000*l.* as the fund, the court decides to allot for the whole salvage 450*l.* Of this sum, 330*l.* is to be the share of the steamer, and 120*l.* is to be paid to Mr. Edwards, and those who went with him in the whaler. Of the 330*l.* allotted to *The Sabrina*, the company is to have 30*l.*, the price of the ruptured cable, and 150*l.* as share of salvage. To Captain Parker I allot 75*l.*, and to the crew of *The Sabrina*, 75*l.*, to be distributed on a scale measured by their rates of wages. To Mr. Edwards, 50*l.* for salvage, together with his disbursements on the occasion of the salvage. The remainder of the 120*l.* to be divided equally among the eight.

Costs of suit to all the promovers.

(The court subsequently decreed for the amount of the bottomry bond, together with interest, at the rate of four per cent., from the day of its having become due, and costs.²)

¹ Not reported.

² The editor is indebted for this report to the kindness of Dr. Kelly.

[* 33]

* THE LORD DUFFERIN, Clark.

Cause, by Act on Petition.

August 14, 1849.

Salvage. Tender pronounced for. Services rendered to a private merchant vessel by officers belonging to the maritime service of the East India Company, in a vessel, the property of the Indian government. The considerations which apply to claims on the part of the government for assisting British commerce in distress, and to the scale of remuneration due to its officers in rendering such assistance.

THIS was an action to recover a salvage remuneration, by Lieutenant Rennie, the commander, the owners, (the East India Company,) the officers and crew of the steam-ship *Feroze*, for services rendered to the ship *Lord Dufferin* and her cargo, value together about 25,000*l*. This vessel sailed from the port of Bombay on the 20th June, 1849, bound for Liverpool. Early on the following morning, the weather being boisterous, she bore up for the harbor, and came to anchor on the Middle Ground. On the 23d, she again weighed and put to sea, the weather very threatening, the wind squally from the S. W., when a heavy sea struck the ship violently, carrying away the rudder. Those on board let go their best bower anchor in seven fathoms water, where they remained during the night, the sea making a constant breach through the stern, there being four feet water in the hold. The vessel drifted so much during the night, that, at daybreak of the 24th, she was within three quarters of a mile of the island of Kenery, and for safety, they slipped and made sail. Finding they were drifting on the Tull Reef, they let go the starboard anchor in 5½ fathoms water. In the afternoon, a heavy sea struck the ship, and filled the cabin with water. During the night, the weather moderated, and in the morning of the 25th, the East India Company's steam-frigate *Feroze* came up, and towed *The Lord Dufferin* as far as the outer light-ship, where she anchored.

A tender of Rs. 5,000 was made and refused.

SIR T. ERSKINE PERRY, C. J. This is a case of salvage claimed against the ship *Lord Dufferin* on the part of several of the officers of the East India Company, and we intimated that it appeared to us, on facts which seemed to be undisputed, that the service performed in this case was a salvage service. Without at-

tempting * to lay down a complete definition of what salvage is,—for all definitions in law are said to be dangerous,—it does not seem open to objection to hold that salvage occurs whenever assistance is rendered to a ship at sea which is in such a dangerous position that in all human probability she will not be able to extricate herself by her unassisted efforts.

We are clearly of opinion that The Lord Dufferin was in this condition. The loss of her rudder, her exhausted crew, her position in foul ground, the strong wind of the monsoon, and a large shoal under her lee, all rendered it highly improbable, that at the time when The Feroze made its appearance, she could have got out of her position without the assistance of steam, and it is not at all unlikely that if the strong gusty weather, which often occurs at that season of the year, had come on, she would not have been able to ride out another flood-tide. All these circumstances constitute the service which was rendered a salvage service; nor does it, I think, detract from the character of the service, that, in the weather which did actually occur, and by the means which the captain was in the act of taking for procuring assistance from the shore, he in all probability would have been able to get his vessel off at a comparatively small expense. Such considerations may affect the *quantum* of the amount to be paid as salvage, but they do not alter the nature of the service rendered, which is to be determined, I conceive, by the actual danger at the moment of rendering it, and not by subsequent events, which no one was capable of foreseeing. This being so, the main question is, whether the sum of Rs. 5,000, which has been tendered, is a sufficient remuneration for the salvors.

To determine this question, it is important to ascertain who the salvors are who are claiming, for this fact does not appear very clear in the meagre pleadings of this case; although, owing to inquiries put by the counsel for the ship and by certain minute facts in the case, I think a very satisfactory conclusion upon it may be arrived at. At the first view of this case it certainly would appear that the present claim was preferred by the government of the country; and if this were the case, a number of considerations would have

* to be carefully weighed, which have never, to my knowledge, been discussed in a court of justice. For, although we see cases in the books where the Lords Commissioners of the Admiralty have preferred claims incidentally for reimbursements to government ships whose crews had earned salvage, there is no case, that I am aware of, in which the queen's government, having determined to assist a merchantman in distress, have subsequently brought

their demands into a court of justice for salvage reward. Whenever such a case does occur, it will probably be held that the government are entitled to claim salvage, though if an act of salvage be an act of government, there is some difficulty in understanding how it would form the basis of a civil contract,—which seems to be the true foundation of a salvage claim,—or what reciprocity there would be, so as to give the merchant a cross-action against the government if the salvage was negligently performed. But, however this be, if the legal right were held to exist, undoubtedly a variety of topics would occur, which, although more fitting for discussion in the cabinet or the legislature, would also be perfectly legitimate in a court of justice, in order to determine the amount of damages which a jury or other competent tribunal ought to give. For it is impossible to avoid observing, that there are various marked distinctions between a government and a private salvor. The latter builds and maintains his ship and crew solely for purposes of profit; he is seeking it eagerly in every part of the world; time to him is money, and he has no interest or concern in the successful ventures of his neighbor. But the public ships of a government are not kept for profit at all, but entirely for the public service. In peace they have scarcely any duties to perform but the protection of commerce, and when they are not performing these duties, they are often lying idle in harbor, with powerful crews, ample equipments, and actually doing nothing. Moreover, the private salvor has no large and abiding interest to protect the commerce of a particular port; he happens to be there for the nonce, and it is wholly indifferent to him, except so far as his individual interests are concerned, that large, generous

[*36] * principles of protection to commerce should be extended to the mercantile world generally. But an enlightened government, especially a British government, has such motives acting upon it most forcibly; and in every British dominion in the world, I will not scruple to say, that the largest protection and assistance to British commerce which can be afforded by the government, without disparagement to other public duties, is regarded as among its paramount obligations. And I was rather surprised, I confess, to hear in this court, the light, not to say contemptuous, tone, with which “cotton bales” were spoken of. It appears to me that the interests of commerce, such as I have been referring to, should always be kept broadly in view by civil courts of justice; and if on the highest tribunal of the kingdom a wool-pack was placed to remind the authorities of the great staple of the country, so a maritime court, sitting in dominions won by the energy and enterprise of

a company of merchants trading to the East Indies, should not be slow to recognize, that one of its most important offices is the protection of British trade.

But it does not appear to me, that in fact the government have preferred a distinct claim for salvage remuneration; and although the act on petition professes to be made "for Lieutenant Rennie, the officer commanding, for the East India Company, the owners, and for the officers and crew of the steam-ship *Feroze*," still I think that the true conclusion which is to be drawn from all the facts of the case is, that the government have no further interposed than to allow Lieutenant Rennie to use their name, in order to enable him to make the best of it he can for his own purposes. And I found this opinion on the three following considerations, which are corroborative of the conclusions I draw in my own mind, as to the enlarged view of policy entertained by the Bombay government. 1st. The government, acting through its military department, sent in its charge for the expenditure of coals, &c., in the two steamers employed, and made no mention of any other demand, 2d. The government have not preferred any distinct claim as to the amount to which they may be entitled in respect of a percentage * as interest [* 37] on the valuable government property employed in the salvage, which is a very different matter from the claim made by Lieutenant Rennie for his personal services. 3d. In the nominal rule which the claimants were called upon to make, only the names of Lieutenant Rennie and the officers of *The Feroze* and of the pilots appear. The only visible intervention of the government, therefore, in this case, is traceable in the allegation, (not an oath,) of the act on petition, that the claim is made on behalf of government, as well as on behalf of Lieutenant Rennie: which allegation is explicable on the suggestion before made.

But supposing that I am altogether wrong in the conclusion of fact which I have drawn, and that the government of Bombay do not take those views of policy which I suppose to actuate them, as to the duties of protecting British commerce when in distress, and within reach of government assistance, and that they are preferring this claim in order to get as much remuneration for their services as the law awards; and supposing, also, that I am wrong in my legal doubts, whether a government ship, lying idle in harbor, is entitled to remuneration for salvage on the same scale as the ship of a merchant, who is seeking only his own private emolument, (on which point Sir John Nicholl's observations, in *The Clifton*,¹ support my

¹ 3 Hagg. Ad. R. 121.

views); still, both these errors, if they be such, are innocuous on this inquiry; for I cannot possibly see how, in any view of the case, the claim of the government, as salvors, can be placed higher than that of private salvors.

The harbor of Bombay is beset with many dangers in the south-west monsoon; if a ship once gets to the northward of the harbor, the road back is difficult; to the southward there is a lee-shore, and at the entrance of the harbor much foul ground. Occasions will therefore, frequently arise for assistance to merchant-vessels making for the port at this period of the year. But if government enter the field as a salvage company, it must be admitted, they will have great advantage over private salvors. Several government esta-

[* 38] blishments,—such as the light-house, the * pilot service, &c.,—are kept up for other public purposes, through which establishments information of what is occurring in the offing will reach the government more speedily than the ears of private ship-owners; and in time of peace, large steamers, ready for sea at a few hours' notice, will usually be available for any salvage purpose, without detriment to the public interest.

When a salvage claim is made by government under such circumstances, the inquiry naturally will arise as to what a private salvor would have done the work for, if he had been enabled to make a fair start in the race; and as it is proved to me satisfactorily that a private steam company would have been glad to undertake, and well able to perform the service in question for Rs. 4,000 or Rs. 5,000, it appears to me to be impossible to award a larger sum to the present claimants, whoever they may be.

The claim for salvage in this case is referable entirely to the state of danger from which The Lord Dufferin was rescued, and the steam-engine and the coals were in fact the true salvors; of personal risk, or any extraordinary labor and naval skill, on the part of Lieutenant Rennie and his officers, I see no indication; and the few hours employed in the trip to The Lord Dufferin do not appear to me to differ, so far as the equipage of The Feroze is concerned, from any similar amount of steaming about the harbor at that period of the year. But Lieutenant Rennie's claim is based by his counsel on the responsibility which he encountered in employing a government vessel in the service of private ship-owners, and the case of *The Lustre*,¹ is relied on; but there is a fallacy in arguing that responsibility on this score can exist, as the service was performed under the

¹ 3 Hagg. Ad. R. 154.

direct orders of government. It is true, that, in the examination of Lieutenant Rennie, he brought forward a responsibility of another kind, which he confronted on deciding to take the steamer out of the pilot's hands. But this, also, on examination, appears to have been so slight a responsibility, that it is not mensurable in money; for Lieutenant Rennie states, and I have no doubt quite correctly, that he knew the harbor quite as well as any [* 39] pilot,—the part of the harbor to which he was steaming was not pilot's ground, and therefore was not better known to the pilot than to himself, who has been acquainted with the harbor for twenty years; and it appears by the evidence, that under the experienced treatment of Lieutenant Rennie, long conversant with steamers, and with the then state of the tide, The Feroze encountered no danger whatever. The salvage claim is, therefore, limited to the due remuneration for a steamer powerful enough to perform the requisite service; and I am satisfied, from the evidence at the bar, that Rs. 5,000 is quite enough, and that, looking at the interests of commerce on the one side, and the personal services rendered by Lieutenant Rennie and the crew on the other, it would be unjust and impolitic to give a larger sum.

I have gone at greater length than I could have wished into a discussion of the principles which I have applied to the decision of this case, but I have been desirous fully to explain them, because, in my opinion, unsound doctrines have been broached in this court with respect to them. To all who are conversant with jury trials in England, it is well known, that in cases of assessment of damages, the moral feeling which is prevailing amongst the jury on the subject under discussion operates largely, and in most cases beneficially, on the amount awarded. The jury not being called on to give reasons for their decision, the exact opinion, and the grounds of it, entertained by them, cannot be made patent in black and white. But when the decision is vested in judges, who have to give their reasons, they are usually able to explain the motives operating upon their judgment; and I have no reluctance whatever to explain the temper of mind with which I regard these claims brought forward by government officers for salvage, and which have made their appearance on three several occasions during the current year. I view them with regret. I do not like to hear it suggested that three-and-sixpenny motives are necessary to be put in action to call the distinguished services of India into performance of public duties. I recollect reading, before I arrived in India, a glowing eulogy on the different services, made by Sir John Malcolm at the bar of the house of commons, describing their zeal, their public spirit, their

[*40] *freedom from all petty, sordid motives,—*avidi laudis, pecuniæ liberales, erant*, as was said of another distinguished race of administrators during their best period. My own experience of India confirms the truth of the above description, and the spirit it denotes is, in my opinion, so desirable to be encouraged, both for the renown of England and the welfare of India, that I have no doubt this impression has operated largely on my mind whilst engaged in estimating the pecuniary claims of members of the service on British merchants in distress.

SIR W. YARDLEY, J. I concur in the judgment of the chief justice, that the sum of Rs. 5,000, tendered to the salvors, was an adequate remuneration for the services performed.

1st. Because I am of opinion that The Lord Dufferin was not in imminent danger. Indeed, if it had not been for the loss of her rudder, I should have had some difficulty in holding that the service was a salvage service at all, the case bearing a strong resemblance to many recently decided in the English Admiralty Court, in which the services were pronounced to be "towage," and not "salvage." 2dly. On the whole evidence, I am of opinion that the salvors did not run any great personal risk, and that the steam-ship *Feroze*, having had seven fathoms of water alongside of The Lord Dufferin, was not placed in a situation of danger by rendering the assistance required. 3dly. The service was somewhat imperfectly performed; for although The Lord Dufferin was towed to a situation of less danger than that from which she was removed, the position in which she was left, half way between the Tull Shoal and the outer Lightship, could not be considered eligible at that season of the year.

For these reasons, although I am quite ready to recognize the right of the officers and crew of a man-of-war to a remuneration for salvage services, on the same scale as it would be awarded to a private salvor, I do not think the claimants entitled to a larger sum than has been tendered, which, if it had been accepted without resorting to litigation, would have given all the parties engaged not far short of a month's pay for the exertions of a few hours.

* THE CHRISTIANA, BROWN.¹

[* 2]

Cause, by Act on Petition.

April 25, 1849.

Collision, A ship, with a licensed pilot on board, having been, whilst at anchor in the Downs, in a December night, the weather bad, been run into by another vessel, and made to start from her anchorage, and she drove into a vessel at anchor — *Held*, that she was to blame, first, because, notwithstanding the bad weather and a large number of vessels lying wind-bound in the Downs, she neglected to send down her top-gallant and main-royal yards, also her short fore and mizen top-gallant masts; and, secondly, because she did not set her stay-sail and jib, and so dragging her anchor off shore. *Held*, further, that though the latter was the fault of the pilot alone, the first was a neglect not only of the pilot, but of the master; and, consequently, the owners were not exonerated under the statute. The pilot, though his duty ended in the Downs, under the circumstances, would not have been justified in quitting the vessel, of which he was still in charge, so that the owners had the legal benefit of his presence.

THIS was a cause of damage, by the owners of the bark *Marshall Bennett*, against the American ship *Christiana*, to recover the loss sustained by a collision between the two vessels.

The act alleged that the bark, of 350 tons, bound from London to Constantinople, with a cargo, on the 1st December, 1848, came to anchor in the Downs, the wind blowing strong, with hard squalls from the W.; that, on the morning of the 4th, the wind blowing a strong gale from the W. S. W. and S. S. W., the best bower-cable was veered out to the end, when, about five, A. M., the man on the look-out descried the ship *Christiana* right a-head, not more than three ship's lengths, driving fast into the hawse of the bark, the night being dark and the ship showing no light, whereas the bark had a bright light in her cuddy; that the ship drove so fast, that it was impossible for the bark's chain to be slipped in time to avoid her, and very soon after she struck *The Marshall Bennett*, and caused her considerable damage. And it alleged that the collision was entirely attributable to the carelessness or want of skill of those on board *The Christiana*, who, notwithstanding the bad state of the weather, and the large number of vessels (above one hundred) lying wind-bound in the Downs, neglected to send down her *top-gallant and main-royal yards, but kept the same across, [* 3] as also her short fore and mizen top-gallant masts, although

¹ [See same case, on appeal, 7 Notes of Cases, Supplement, p. 41, and 7 Moor, P. C. R. 160.]

the same or similar precautions were adopted by The Marshal Bennett, and other vessels in the Downs, whereby they were enabled to ride out the bad weather in safety; that, even after The Christiana was found to be driving from her anchors, no measures were taken on board of her, by exhibiting a light or otherwise, to give timely warning to other vessels, in consequence of which neglect, prior to her collision with the bark, she had come in collision with another vessel, The Reuennais; and that, had her stay-sail and jib been set, she would have dragged her anchor off shore, and cleared The Marshal Bennett.

The answer, on the part of The Christiana, (a ship of 762 tons,) alleged that she was bound from London to New York, with a cargo and 140 passengers; that, on the night of the 3d December, the wind blowing strongly from the W. S. W., she was brought up with her small bower anchor and seventy-five fathoms of chain, under the directions of George West Brown, a licensed Trinity pilot, there being about one hundred and fifty vessels lying in the Downs, wind-bound; that early in the morning of the 4th, it being dark, the wind having veered to the S. S. W., a heavy squall came on, during which a strange bark drove down, stern foremost, upon The Christiana, and occasioned her to start her anchorage; that the ship's best bower anchor was then let go, under the pilot's order, and the best bower chain veered out to sixty fathoms, the ship continuing to drive, when, all at once, the bark was seen right astern, whereupon the pilot, considering that the veering out of more chain would be dangerous, from the close proximity of the two vessels, ordered the veering to be stopped, and that the fore topmast stay-sail should be set, the fore yards filled, and the helm put hard a-starboard, (which were instantly done,) in order, if possible, to sheer the ship clear of the bark, which was hailed to slack away or slip their chain; that the bark's crew paid no attention to the hailing, nor made any attempt to avoid a collision, and the ship drove down upon the bark; that, at [*4] this time, one only of the bark's crew * appeared on deck, and her chain was foul; that the entire management of The Christiana, throughout the premises, was in the hands of the pilot only, and that all his orders were instantly and implicitly obeyed. It denied that there was any occasion for her to have sent down her top-gallant and main-royal yards, and her short fore and mizen top-gallant masts, or either, at the period of her being brought up, or that her not having sent them down occasioned the collision, which was occasioned solely by the strange bark having driven into her. It alleged that The Christiana had a large and brilliant lamp burning in the after-cabin, the light from which could be seen a great

way off through the large windows in her stern, and there was a large bright binnacle-lamp on the higher part of her poop, visible for three miles. It denied that she had been in collision on the night in question, save the aforesaid, and it alleged that this collision, if not the result of accident, was imputable to the bark; but if to The *Christiana*, her owners were exempt from liability under the statute, by reason of the ship being in charge of a pilot, whose orders were obeyed.

The court was assisted by two of the elder brethren of the Trinity House.¹

Sir J. Dodson, Q. A. and Dr. Bayford, for the bark.

Drs. Addams and Twiss, for The *Christiana*.

DR. LUSHINGTON, addressing the elder brethren: Gentlemen—The particular circumstances upon which your ultimate opinion must be founded are these: The *Marshall Bennett*, the party suing, makes the following charges—First, the neglect of The *Christiana* to send down the top-gallant and main-royal yards, and, instead of so doing, keeping them across, as also her short fore and mizen top-gallant masts. The fact does not seem to be denied; but we have to consider whether the charge of neglect is well founded, and, if it is, whether the collision took place in consequence of this neglect. The second charge is, that The *Christiana* did not exhibit a light, or otherwise give *warning of her approach. This is [*5] expressly denied, and I think it is proved that she did exhibit two lights. It is for you to determine whether that was sufficient. The third charge is, not setting the stay-sail and jib, and so dragging her anchor from the shore, after the first collision. The answer to that is, that the fore topmast stay-sail was*set, the fore yards filled, and the helm put hard a-starboard, upon descrying The *Marshall Bennett*. This again is a nautical question, for your determination. The last charge against The *Christiana* is, not slipping her anchor and going out to sea. It is not disputed that the fact was so; but it is said that it would not have been right to adopt that measure. We must consider whether these facts are true; if so, whether they carry blame with them, and whether that blame attaches to the master and crew, or to the pilot.

The answer of The *Christiana* contains a defence of herself, and

¹ Captain Hayman and Captain Bax.

prefers a charge against The Marshal Bennett. In the defence, it is alleged that The Christiana was not driven from her anchor by any fault of her own, or even by the weather, but by another vessel having broken adrift and run against her, and she says that that vessel was not The Reuennais. This is a question of evidence, and the importance of it is this, that, notwithstanding she was riding at a single anchor, she would have remained in perfect safety had it not been for this unfortunate accident, which compelled her to break her anchorage. The reply, on the part of The Marshal Bennett, is, that The Christiana did drive from her anchor, and ran into The Reuennais.

Now, it is distinctly sworn, on the part of The Christiana, that, whilst at anchor, some vessel unknown did run into her, and make her start from her anchor, at half past two, A. M., and if the persons swearing this do not speak the truth, it would look very much as if they were deliberately perjured. This, however, was sworn before it was known what would be the case on the other side, and therefore it is entitled to greater consideration. Two persons on board The Reuennais swear that The Christiana did run into them; but they make the collision to have taken place at five o'clock, and

[* 6] not at half past two. As this is a question of evidence * as much as of nautical experience, I am bound to tell you that I do not think it is made out that there was any collision between The Christiana and The Reuennais. These two French persons may not have perjured themselves, but I am not satisfied that they are to be believed in preference to all the rest of the witnesses. I do not think it is proved that The Christiana drove from her anchor before the first collision; the fact, however, may turn out of very little importance. The Christiana says she took all the measures which she ought to have adopted, under the circumstances; that the best bower-anchor was let go; that the fore topmast stay-sail was set, the fore yards filled, and the helm put hard a-starboard previous to the collision. The pilot says he gave the order, and you must judge whether it was carried into execution.

The counter-charges made by The Christiana against The Marshal Bennett are — First, that her cable was foul. I think it is proved that it was not fouled. The Christiana says The Marshal Bennett ought to have slipped from her anchor; she denies this, and says that it would have torn out the hawse timber, and done other mischief. This is a point for your consideration. The next averment is, that the Marshal Bennett had not a good look-out; and you will say whether you think that two persons were sufficient for the

anchor-watch. I see no reason to impute the slightest dereliction of duty in that respect. It is then said that The Marshal Bennett had no visible light. She had a light, such as she describes; but whether she ought to have had one of a different character, is for you to determine. The ordinary rule, unquestionably, is, that vessels need not carry a light; but there are exceptions, when a vessel is at anchor.

Here arises another question of great importance, not merely to the parties, but to the interests of navigation. It is said, on behalf of The Christiana, that she had a pilot on board; that, whether right or wrong, she did every thing he directed, and, therefore, under the act of parliament, her owners are exempted from all responsibility. This opens up several considerations. We know, generally, that a pilot has the whole conduct of a ship; that, under all ordinary circumstances, *his orders are to be obeyed [*7] implicitly by those under his command; and that, even if the measures are wrong, the owners are exonerated from all responsibility. The reason is manifest. Why is a pilot to conduct a vessel, except on the supposition that he has more local knowledge than the master and the crew? But I never can think that a master is to divest himself of all discretion, and abandon his vessel to the ability of a pilot. The first case of that kind which occurred here was that of The Diana,¹ where the pilot, the master, and the mate went below, and I held that all parties were to blame. The case was carried to the Judicial Committee, and they upheld my decision.² Looking at all the circumstances in this case, you will have to consider whether any thing was omitted to be done which was not only the duty of the pilot, but also of the master. It has been argued that we have nothing to do with the pilot; that when he arrived in the Downs his work was done; that he was a mere supernumerary on board, and the owners cannot avail themselves of the Pilot Act, which says that no pilot shall be at liberty to quit the vessel until the service he has undertaken has been performed. You will have to consider whether, looking at the state of the weather, the pilot would have been justified in quitting his vessel. If so, it is clear that his duty would have been at an end. This is a very important case, and I shall request you to retire with me, to see if we can satisfactorily determine it.

¹ 1 W. Rob. jun. 131.

² Stuart v. Isenmonger, 4 Moo. P. C. C. 11.

After consultation.

PER CURIAM.

The gentlemen by whom I have been assisted have taken into consideration all those points which were deemed material.

With respect to the first charge preferred by The Marshal Bennett — that of neglecting to send down the top-gallant and main-royal yards — they are of opinion that this was a fault and [*8] neglect not only in the pilot, but in the master ; * that it was the duty of the latter to have interfered, and to have resorted to proper measures for the safety of his ship. The exhibition of a light was disposed of before. They are of opinion that there was an omission in not setting the stay-sail and jib, and so dragging the anchor from the shore ; but that belongs to the pilot alone. They think that The Christiana was justified in not slipping from her anchor and going to sea.

With respect to the charges against The Marshal Bennett, they are of opinion that the cable was not foul, and that it was not right, necessary, or expedient, to cut it or slip from it ; but, at the same time, it was not in the condition that it ought to have been, to be easily slipped from. They are of opinion that the pilot was in charge of The Christiana, and that, under the circumstances, he would not have been justified in quitting the vessel. The owners, therefore, are entitled to all the benefit that can accrue to them from his being on board.

It only remains for me to state the conclusion, which is, that The Christiana was to blame, and that there was negligence on the part both of the master and the pilot. The master being to blame, according to the case of The Diana, the owners are not protected by virtue of the act. I therefore must pronounce against the case of The Christiana ; and, with regard to The Marshal Bennett, as the Trinity Masters are of opinion that there is nothing in her conduct deserving blame, the owners are entitled to succeed in their case.

As to the fact of The Christiana having been driven from her anchorage by another vessel, I submitted that point to the Trinity Masters, who were strongly of opinion that she might have been brought up, notwithstanding she had been run into, if they had taken down the top-gallant and main-royal yards.

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3. Where a large steamer, proceeding during a dark night in the Frith of Clyde, a very thronged thoroughfare of traffic, at the rate of from twelve to fourteen miles an hour, came in collision with a small schooner, deeply laden, which (the tide being ebb, and the wind very light) was incapable of altering her position by helm or sails, and, not being seen by the steamer, (the schooner not having or exhibiting any light,) was run down and sunk — *Held*, that the steamer was responsible for the damage done; her watch and look-out, though sufficient under ordinary circumstances, not being proper under the circumstances of the darkness of the night and the steamer's rate of going. What, in such a case, is a sufficient and proper look-out? Rule of navigation as to lights on board sailing vessels IV. Sup. 31
4. Construction and application of Trinity House rules. Variation of ground of defence set up by plea in argument V. 170
5. Where, by neglect of the Trinity House rule, on the part of a vessel bound to give way to another vessel, the latter was run down, it cannot be set up in defence that this vessel might have avoided the collision by disobeying the rule V. 276
6. Where a steam-tug was run down by a sailing vessel, in a narrow cut leading to a dock, navigable only at a particular period of the tide, at which period the collision occurred; the tug, proceeding in an opposite direction, held to be to blame V. 279
7. A vessel, A, on the starboard tack, with the wind three points free, at night, descries another vessel, B, ahead, close-hauled, on the larboard tack, approaching, but so far to windward that, believing if B kept her course they would have gone clear, she did not give way, (whereas B ported her helm,) and the vessels came in collision — *Held*, that A was in fault and B did right V. 368
8. A vessel, bound by the rules of navigation to port her helm, not doing so in sufficient time, held responsible for the damage caused by the consequent collision V. 372
9. Where two vessels were closely approaching each other on a dark night, and the vessel on the larboard tack was unmanageable, and could not, therefore, give way, and the vessel on the starboard tack did not perceive her unmanageable state, and kept her course — *Held*, that their collision was purely accidental. What is the duty of a vessel in an unmanageable condition, under such circumstances? V. 387

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10. When two vessels are in danger of collision, in broad daylight, one of them lying to, dead, with her head to windward, if the other, in order to avoid a collision, should there be a possibility of avoiding it, does more than she is bound to do, the court will view that with great approbation	VI. 29
11. Rules of navigation, where two sailing vessels meet at night, being on different tacks	VI. 36
12. A vessel, A, sailing on the starboard tack, with the wind three points free, at night, descries, at a quarter of a mile, another vessel, B, close-hauled, on the larboard tack, as alleged, so far to windward that, believing if both vessels kept their courses they would go clear, she did not give way, (whereas B ported her helm,) and the vessels came in collision — <i>Held</i> , that A was in fault and B did right, the two vessels having approached each other stem on	VI. 53
13. In cross-actions, in which the evidence was so balanced that neither the Trinity Masters nor the court could decide which vessel was to blame, both actions were dismissed	VI. 240
14. Collision between a sailing vessel and a steamer, during a fog — <i>Held</i> , that the sailing vessel was to blame. The carrying of studding-sails, in such circumstances, imprudent	VI. 600
15. A vessel is not justified in departing from the rules of navigation, although it might have happened under extraordinary circumstances that, by so doing, a collision would have been avoided. An exception to a general rule must be most satisfactorily proved	VI. 607
16. Collision during a dark night. The plea of inevitable accident on the part of the vessel which should have ported her helm and did not, and which was proceeding at the rate of eight or nine miles an hour, not sustained. What is "inevitable accident?" considered	VI. 633
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19. Collision between a sailing vessel and a steam vessel; the latter having acted in obedience to the stat. 9 & 10 Vict. c. 100, held to be blameless. Construction of that statute	VII. 137
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21. Collision between a steamer and a sailing vessel; the former held to be in fault, for not wearing in time. Effect of protests, as evidence, in such cases	VII. 507
22. Where the master of an American vessel, held not to be in fault, did not, at the time of the collision, order out a boat and afford assistance to save the life of a seaman, who had fallen overboard from the other vessel, and was drowned; the court, in pronouncing in favor of the American owners, refused to decree their costs. The owners of a vessel are responsible, civilly speaking, for the whole conduct of	

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23. A vessel close-hauled, on the starboard tack, apprehending a collision with another vessel, sailing free, at night, having, in order to ease the blow, starboarded the helm, held to be to blame. Difference of opinion between the two Trinity Masters . . . VII 511
24. A ship, with a licensed pilot on board, whilst at anchor in the Downs, in a December night, the weather bad, having been run into by another vessel, and made to start from her anchorage, and she drove into a vessel at anchor — *Held*, that she was to blame, first, because, notwithstanding the bad weather and a large number of vessels lying wind-bound in the Downs, she neglected to send down her top-gallant and main-royal yards, also her short fore and mizen top-gallant masts; and secondly, because she did not set her stay-sail and jib, and so dragging her anchor off shore. *Held*, further, that though the latter was the fault of the pilot alone, the first was a neglect not only of the pilot, but of the master; and, consequently, the owners were not exonerated under the statute. The pilot, though his duty ended in the Downs, under the circumstances, would not have been justified in quitting the vessel, of which he was still in charge, so that the owners had the legal benefit of his presence . . . VII 2
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26. On a dark night, sailing vessels coming suddenly upon each other are not altogether absolved from the duty of observing the Trinity House rules; generally speaking, it is desirable that the general rules should be adhered to strictly . . . VI 277
27. A brig, moored in the Thames, is in mid-day run into by a steamer having a duly licensed pilot on board, who ordered the engines to be stopped and reversed — *Held*, that the engines were not reversed so promptly as they might have been, and as the evidence of the engineers was not produced, that the pilot was not solely and exclusively to blame, and the owners, therefore, were not exonerated . . . VI 245

Costs. (See *Practice*.)

G.

Greenwich Hospital. Salvage, derelict. Claim by Greenwich Hospital. After a derelict had been in the possession of salvors for five days, a queen's ship came up, and was allowed to join in the remaining service, for which a salvage reward was allotted to her — *Held*, that the service so rendered by her

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was not rendered to a derelict, so as to entitle Greenwich Hospital to the percentage and unclaimed shares, under 57 Geo. III. c. 127 VII. 180

J.

- Jurisdiction.* 1. A vessel, having been wrecked, was sold, as sunk, and the purchaser, in order to raise her, employed a patented apparatus, belonging to a salvage company, by a verbal agreement with one G. N., and the first attempt failing, he made an agreement in writing with another person, E. A., for a farther attempt with the same apparatus, which likewise failed, and another agreement, in writing, was made between the purchaser and G. N., for a third attempt, which succeeded; the salvage company, the owners of the apparatus, sued for salvage, disavowing the agreements, as unauthorized by them; the owners appeared under protest, alleging that the services were not of the nature of salvage, but had been rendered under a contract made on land, over which this court had no jurisdiction — *Held*, overruling the protest, that the service being in its nature of a salvage character, the jurisdiction of the court over the subject-matter was not ousted by a mere averment of a binding agreement on land; that the court must try the question, whether there was an agreement or not; and if there was, it has jurisdiction over the money brought in under an agreement pleaded in bar VI. Sup. 43
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3. Wages of master (a co-mortgagee of the ship) subject to a settlement of accounts with the mortgagee in possession, the original owner being bankrupt. Objection to the registrar's report V. 348

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1. In a cause of damage, after the act had been given in by the promovents, they were directed, on the application of the defendants, to alter the form of proceeding, and to bring in a libel, on payment, by the defendants, of the expense incurred by the act VI. 35
2. Where a party is condemned in costs, which have been regularly taxed and paid, the court will not entertain a motion for reconsidering the taxation III. 270
3. Where the owners alleged the value of the ship to be 600*l.*, and the salvors, without requiring an affidavit, took out a commission of appraisement, which returned the value at 447*l.*, the court condemned the salvors in the costs of the

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<i>Possession</i> , suit of. A master of a vessel cannot, in such a cause, dispute the title of the owner	L 114

S.

<i>Salvage</i> . 1. An agreement, or understanding, between the owners of the vessel salvaged and the owner of a cutter engaged by them to render the service, no specific sum being fixed therein — <i>Held</i> not to bar the parties suing, (including the master and crew of the cutter,) who acted in the service under the personal direction of the owner of the cutter, but were not parties to, or cognizant of, the understanding. An agreement, though it may estop parties from suing, cannot affect the nature of the service	VII 361
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3. The supplying of a cable and chain, by the crew of a lugger, to a vessel which had slipped her anchor, but was not otherwise disabled, in boisterous weather, and in the neighborhood of dangers, held to be a salvage service. The nature of such an act differs, according to the circumstances under which it is performed. A pilot on board the vessel salvaged is not to refuse to make an affidavit for the salvors	VI 64
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